CLERK'S COPY.

TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1929

No. 311

WALTER A. MAY, HERBERT L. MAY, EDWIN C. MAY, ET AL., EXECUTORS OF THE LAST WILL AND TESTAMENT OF PAULINE MAY, DECEASED, PETITIONERS,

vs.

D. B. HEINER, COLLECTOR OF INTERNAL REVENUE FOR 23RD DISTRICT OF PENNSYLVANIA

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT

PETITION FOR CERTIORARI FILED AUGUST 8, 1929

CERTIORARI GRANTED OCTOBER 21, 1929

(34,442)

(34,442)

SUPREME COURT OF THE UNITED STATES

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RECORD.

Among the Rolls, records and judicial proceedings had in the District Court of the United States for the Western District of Pennsylvania, at No. 3097 in Law, may be found the following words and figures:

IN THE
DISTRICT COURT OF THE UNITED STATES
FOR THE WESTERN DISTRICT OF PENNSYLVANIA.

WALTER A. MAY, HERBERT L. MAY, EDWIN C. MAY and LOUIS J. AFFELDER, executors of the last will and testament of Pauline May, deceased, v. D. B. HEINER, Collector of Internal Revenue for 23rd District of Pennsylvania.	No. 3097 Law.

Docket Entries.

July 15, 1924, Praecipe for summons in assumpsit and statement of claim filed.

July 15, 1924, Summons in assumpsit issued returnable first Monday next.

July 18, 1924, Summons returned on D. B. Heiner, Collector of Internal Revenue, by handing to and leaving a true and attested copy with him personally, at Pittsburgh, Pa. on July 15, 1924.

July 18, 1924, Praecipe for appearance of Walter Lyon and Warren H. Van Kirk, attorney for defendant, filed.

Aug. 12, 1924, Motion to strike off plaintiff's statement filed and entered.

June 24, 1925, Amended statement of claim filed.

Aug. 3, 1925, Motion to strike off plaintiff's statement of claim from the record filed and entered.

Jan. 12, 1928, Opinion and order filed and entered, directing that the judgment be entered for the defendant on the question of law raised by affidavit of defense.

Feb. 25, 1928, Notice of appeal with service accepted filed.

Feb. 25, 1928, Stipulation for printing record filed.

Feb. 25, 1928, Assignment of errors filed.

Feb. 29, 1928, Cost bond on appeal approved by the Court and filed.

May 3, 1928, Certificate of probable cause for collection of tax filed.

Amended Statement of Claim.

Filed June 24, 1925.

Walter A. May, Herbert L. May, Edwin C. May and Louis J. Affelder, executors of the last will and testament of Pauline May, deceased, of the city of Pittsburgh, county of Allegheny, state and district aforesaid, plaintiffs, bring this action against D. B. Heiner, Collector of Internal Revenue for the 23rd District of Pennsylvania, the defendant, to recover the sum of Five Thousand Seven Hundred Sixty-three and 82/100 ($5,763.82) Dollars, with interest from the 11th day of September, 1923, upon a cause of action whereof the following is a statement:

1. Walter A. May, Herbert L. May, Edwin C. May and Louis J. Affelder, are the executors of the last will and testament of Pauline May, deceased, who died in the city of Pittsburgh, state of Pennsylvania, on the 25th day of March, 1920.

2. D. B. Heiner, defendant above named, is the collector of internal revenue for the 23rd District of Pennsylvania, with whom the plaintiffs filed all of the claims hereinafter more fully set forth, and to whom plaintiffs made the payment for the recovery of which this suit is brought.

3. Heretofore, to-wit, on the 23rd day of March, 1921, plaintiffs made what is known as a return for Federal estate tax due from the estate of the said decedent in the manner provided by law, and filed the same with the defendant.

4. Heretofore, to-wit, on the 28th day of April, 1921, plaintiffs made an amended return, and in said return as amended, the plaintiffs declared the total gross estate of said decedent to be the sum of $206,260.87, the total deductions $57,799.34, and the net estate for taxes $148,461.53. The taxes due on said estate, calculated in the manner provided by law, was $2,469.23, which sum was duly paid by the plaintiffs to the defendant.

5. In Schedule E of said returns, the executors, complying with the requirements of the United States Revenue Acts and the regulations of the Treasury Department, listed as assets of the said estate, the sum of $20,800 as the value of all gifts and transfers, including trusts, of a material part of the estate, made or executed by the decedent within two years prior to the date of her death, other than by a bona fide sale

for a fair consideration in money or money's worth, said schedule containing the details of the transfer, that is, a specific description of the property transferred and its value on the date of decedent's death, and, in further pursuance of the said requirements and regulations, and particularly in answer to question 4 appearing on said schedule E, viz.:

"4. What trusts, if any, created by the decedent, were in existence at the time of his death."

plaintiffs answered said question:

"See copy attached"

and attached to the said schedule, as Exhibit #1, a copy of a declaration of trust made by the decedent on May 15th, 1917 and a copy of an agreement dated the 1st day of October, 1917, made by the decedent as assignor with Barney May, Walter May, Herbert L. May, Edwin C. May and Louis J. Affelder, therein designated as Trustees. A copy of said Schedule E, marked Exhibit "A", is hereto attached and made part hereof.

In the first declaration of trust above mentioned, the decedent recited that she held certain property, viz., certain bonds, stocks, notes and moneys, part of which, amounting to a market value of about $150,000, including special bank account, were purchased largely with the funds of her husband, Barney May, and she desired to place them in trust as thereinafter mentioned, and that she did therefore, in consideration of the above and for other good and valuable considerations, agree as follows: That she, the said Pauline May, will sell, assign and transfer the said property to Barney May, Walter A. May, Herbert L. May, Edwin C. May and Louis J. Affelder as trustees, said

trustees to pay to Barney May the net income for life, and after his death to Pauline May (the assignor) for life, if she survived him, and after the death of both of them, that is, the said Barney May and Pauline May, the said property is to be divided equally among her sons and daughter, Walter A. May, Estelle M. Affelder, Herbert L. May and Edwin C. May, all of which will appear in a formal instrument of trust to be drawn up listing the said property and duly executed by her, the said Pauline May.

In the said agreement of the 1st day of October, 1917, above referred to, it is provided as follows: 1st, the assignor, the said Pauline May, does transfer and assign to the said trustees (being the same persons mentioned as trustees in the declaration of trust dated May 15th, 1917 hereinabove referred to) all of the bonds, stocks, securities, sums of money and other property mentioned in the list or lists attached thereto signed by the parties, in trust for the purposes, among other things, of collecting the dividends, interest and and income thereof, investing and reinvesting the proceeds of the sale or sales of said securities, and for the payment of net dividends, interest and income thereof after payment of all taxes, costs and expenses, to the said Barney May during his lifetime, and after his decease to the said Pauline May during her lifetime, and and after her decease, all the property of said trust, in whatever form or shape it may then be, was, after the expenses of the trust had been deducted or paid, to be distributed equally between Walter A. May, Herbert L. May, Edwin C. May and Estelle M. Affelder, children of the said Pauline May and Barney May, and in case of such children be deceased, then as such de-

ceased child shall appoint by his or her last will and testament or by other written instrument directed to the trustees, and in default of such appointment, to the heirs of such deceased child, *per stirpes*. Then follows a list of the said bonds, stock, securities, sums of money and other property.

Plaintiffs did not include the amount of the said last mentioned bonds, stocks, securities, sums of money and other property in the gross estate of the decedent for the reason that the said transfer was not a transfer of a material part of the estate of the decedent made or executed by her within two years prior to the date of her death other than by bona fide sale, for a fair consideration in money or moneys worth, and particularly for the reason that the said transfer was made more than two years prior to the death of the decedent and was not made in contemplation of death or to take effect at or after the death of the said decedent.

6. On or about March 5th, 1923, the defendant, as collector of the United States internal revenue for the 23rd district of Pennsylvania, claiming to act in pursuance of the provisions of the United States Internal Revenue Act of 1918, served a notice and demand for payment on the plaintiffs of an additional estate tax assessed by the Commissioner of Internal Revenue against the estate of said decedent, amounting to $5,557.76; a copy of said notice and demand and the letter and notice from the Commissioner of Internal Revenue referred to in said letter of the defendant's dated March 5th, 1923, is hereto attached and made part hereof, and marked Exhibit "B". That, as appears by the said letter and notice from the Com-

missioner of Internal Revenue forming part of Exhibit "B", certain minor changes were made in the valuations of certain items in the gross estate and a minor change in a deduction, and the said Commissioner included among the transfers of property required to be listed under Schedule E of the return, the items of property transferred by the decedent by the instrument dated May 15th, 1917, and amplified by the instrument dated the 1st day of October, 1917 forming part of Exhibit "A" attached hereto, at a valuation of $163,089.18, thereby increasing the net value of the estate by the said sum of $163,089.18; that the inclusion of said last mentioned property valued at $163,089.18, was erroneous and unlawful.

7. That plaintiffs, on or about March 30th, 1923, paid to the defendant the sum of $33.34 additional tax on said estate, being the additional tax due by reason of the minor changes made as above referred to, and on or about the 30th day of March, 1923, made to the Commissioner of Internal Revenue a claim for abatement for the balance of $5,524.42 of said additional tax assessment, a copy of said claim for abatement being attached hereto and made part hereof, marked Exhibit "C". On May 1st, 1923, the Commissioner of Internal Revenue formally rejected the plaintiffs' claim for abatement in its entirety and on the merits thereof and on May 3rd, 1923 the defendant made a demand upon the plaintiffs for the payment of the said sum of $5,524.42 together with interest at the rate of 10% per annum from April 5th, 1923 until paid. A copy of said demand is attached hereto and made part hereof and marked Exhibit "D".

8. On, to-wit, the 11th day of September, 1923, the plaintiffs paid to the defendant the sum of $5,763.82, being the sum of $5,524.42 with said interest, so illegally assessed against them, under protest and in order to avoid a penalty.

9. After the plaintiffs had made payment to the defendant of the said sum of $5,763.82 so improperly and erroneously assessed against them, to-wit on or about the 5th day of November, 1923, they duly filed with the said Commissioner a claim for refund of the amount so improperly and erroneously assessed. A copy of said claim for refund is attached hereto and made part hereof and marked Exhibit "E". On or about the 20th day of February, 1924, the said Commissioner formally rejected plaintiffs' claim for refund in its entirety and on the merits thereof. A copy of said decision of the Commissioner of Internal Revenue dated February 20th, 1924, is attached hereto and made part hereof and marked Exhibit "F".

10. No part of the said sum of $5,763.82 has been repaid to the plaintiffs and the whole amount thereof, with interest thereon from September 11th, 1923, remains due and owing from the defendant to the plaintiffs.

11. This is a suit of civil nature at common law and the matter in controversy, exclusive of interest exceeds the sum of $3,000, and this suit and the cause of action herein set forth, arise under the Constitution and laws of the United States and under the laws of the United States providing for internal revenue.

Wherefore the plaintiffs claim damages of the defendant in the sum of $5763.82 with interest thereon

from September 11th, 1923 together with the costs of this suit.

SACHS & CAPLAN.

Western District of Pennsylvania,
Allegheny County, } *ss:*

Before me, the undersigned authority, a notary public in and for the County of Allegheny in said Western District of Pennsylvania, personally appeared Walter A. May, one of the plaintiffs above named, who being duly sworn, deposes and says that the facts set forth in the foregoing statement are true and correct.

WALTER A. MAY.

Sworn to and subscribed this 18th day of June, 1925.

DOROTHY C. PAULIN,
[SEAL] *Notary Public*

My commission expires January 7, 1927.

EXHIBIT "A"

Estate of Pauline May 23rd District of Pennsylvania

SCHEDULE E

Transfers.

Instructions.

All gifts and transfers, including trusts, of a material part of the estate made or executed by the decedent within two years prior to the date of death, other than by a bona fide sale, for a fair consideration in money

or money's worth, must be returned under this schedule and the value of the property shown in the first column. The value must also be extended into the second column for inclusion in the gross estate unless the executor has clear evidence to show that the transfers in question were not in fact made in contemplation of death.

All gifts and transfers made in contemplation of death or to take effect at or after death without such consideration, are taxable and must be included in the gross estate regardless of the date of transfer. All transfers of a material part of the decedent's estate made more than two years prior to death must be returned under this schedule, but the value need not be extended into the second column if the executor desires to contend that the transfers were not made in contemplation of death.

In all cases where a transfer or gift is listed under this schedule, but the value not extended into the second column for inclusion in the gross estate, the executor is required to submit as a part of the return documentary evidence in the form of affidavits fully setting forth all the facts and circumstances indicating the intent of the decedent in making the transfer.

Where the transfer was effected by deed of trust, copy of such instrument should be filed in duplicate.

Make full entry, giving name of transferee, date and form of transfer, description of property, and value at time of death.

For further instruction see Article 22 *et seq.*, Regulations, No. 37, Revised, 1919.

(1) Did the decedent, during the period within two years prior to death, make any transfer of a ma-

terial portion of his estate in the nature of a final disposition or distribution thereof without a fair consideration in money or money's worth? (Answer "Yes" or "No")—no.

(2) Did the decedent, at any time prior to two years before his death, make any transfer or create any trust in contemplation of or intended to take effect at or after death without consideration? (Answer "Yes" or "No.") Yes.—See item one below.

(3) Did decedent, at any time, make a transfer of a material portion of his estate without consideration, but not believed to be in contemplation of death or intended to take effect at or after death? (Answer "Yes" or "No.") No.

(4) What trusts, if any, created by the decedent, were in existence at the time of his death?

Item No.	Details of transfer	Value on day of death	Value to be included in gross estate
1.	130 shares Blaw-Knox Co. preferred par value $100.00, at 160, unlisted (held by Herbert L. May, Trustee)	$20,800.00	20,800.00
	Total		$20,800.00
	Grand Total		$20,800.00

Estate of Pauline May District of 23d, Pennsylvania.

SCHEDULE E

Transfers.

Exhibit No. 1 (Declaration of Trust)

"Pittsburgh, Pa., May 15, 1917.

Whereas Pauline May holds certain property, namely, certain bonds, stocks, notes and moneys, part of which, amounting to a market value of about $150,000. including special bank account, were purchased largely with funds of her husband, Barney May, and she desired to place them in trust as hereinafter mentioned, now, therefore, in consideration of the above and for other good and valuable considerations, it is agreed as follows: Pauline May will sell, assign and transfer said property to B. May, W. A. May, H. L. May, E. C. May and L. J. Affelder as trustees, the said trustees to pay to B. May the net income for life, and after his death to Pauline May for life if she survive him; and after the death of both of them the said property is to be divided equally among her sons and daughter, W. A. May, Estella M. Affelder, H. L. May and E. C. May; all of which will appear in a formal instrument of trust to be drawn up, listing the said property, and to be duly executed by her.

(Signed) PAULINE MAY [SEAL]

Witness:

(Signed) E. H. BEILSTEIN"

"THIS AGREEMENT

Made this first day of October 1917, by and between Pauline May, wife of Barney May, of the City of Pittsburgh, Pa., hereinafter designated the Assignor, and Barney May, Walter A. May, Herbert L. May, Edwin C. May and Louis J. Affelder, of the same place, hereinafter designated the Trustees, which agreement may, for convenience, be designated as the 1917 Pauline May Declaration of Trust.

For a good and valuable consideration to the said Assignor specially moving, it is agreed as follows:

First: The said Assignor does hereby transfer, set over and assign, and by these presents has transferred, set over and assigned unto the said trustees, all of the bonds, stocks securities, sums of money, and other property, mentioned in the list or lists attached hereto and signed by the parties hereto, IN TRUST for the uses and purposes herein mentioned, with full power and authority to do and perform all the things, acts and matters as hereinafter set forth as follows, to-wit:

a. To collect the dividends, interest and income thereof, to sell and convey the same or any part thereof if they deem it advisable, for such price or prices, and on such terms and conditions, as they may see fit and proper; to invest and re-invest the proceeds of the said sale or sales in such form or securities or property, real, personal or mixed, as they shall deem proper, whether the same be considered legal investments for trust funds or not, and generally, to exercise, with respect to any and all such bonds, stocks securities, sums of money and other property, all rights, including the right to vote, which are ordi-

narily held by the actual owners thereof, and all persons dealing with the said Trustees concerning the subject or subjects of this trust are hereby relieved from any and all obligation to look to the application of the purchase money.

b. To pay the net dividends, interest and income thereof, after payment of all taxes, costs and expenses incurred by them in their discretion, in the performance of the duties hereunder; to Barney May during his lifetime, and after his decease, to Pauline May during her lifetime, and after her decease, all the property in said Trust, in whatever form or shape it may be, shall, after the expenses of the Trust have been deducted or paid, be distributed equally among Walter A. May, Herbert L. May, Edwin C. May and Estelle May Affelder, children of the said Pauline May and Barney May, and in case any of such children be deceased, then as such deceased child shall appoint by his or her last will and testament, or by other written instrument, directed to the Trustees, and duly witnessed, and in default of such appointment, to the heirs of such deceased child, *per stirpes.*

IN WITNESS WHEREOF the parties have hereunto set their hands and seals the day and year first above written.

PAULINE MAY	[SEAL]
BARNEY MAY	[SEAL]
WALTER A. MAY	[SEAL]
HERBERT L. MAY	[SEAL]
EDWIN C. MAY	[SEAL]
LOUIS J. AFFELDER	[SEAL]

Attest:

G. B. RYLAND

LIST ATTACHED TO 1917 PAULINE MAY DECLARATION OF TRUST:

Security	No.	Par Value	Rate	Due	Description
Bonds	3	$1,000	5%	1921	Pbg. Bessemer & Lake Erie Equipment Trust
"	4	1,000	4%	1947	Union Pacific Ry. Co.
"	2	500	4%	1947	Union Pacific Ry. Co.
"	5	1,000	4½%	1963	Chicago Union Station Co.
Gold Notes	5	1,000	5%	1920	Swiss Confederation
Bonds	6	1,000	5%	1949	Philadelphia Company
"	5	1,000	4½%	1965	Pennsylvania R. R. Co.
"	5	1,000	4%	1946	Toronto, Hamilton & Buffalo R. R. Co.
Road Bonds	5	1,000	4%	1926	Allegheny County
Gold Notes	5	1,000	5%	1918	United Kingdom of Great Britain & Ireland
" "	10	1,000	5½%	1919	" " " " "
Bonds	5	1,000	5%	1926	Dominion of Canada
"	5	1,000	4%	1990	W. Va. & Pbg. Ry. Co.
"	10	1,000	5%	1939	Jones & Laughlin Steel Co.
"	5	1,000	6%	1920	Government of Argentine Nation
"	5	1,000	6%	1925	Standard Varnish Works
"	5	1,000	4½%	1964	Pittsburgh, Cincinnati, Chicago & St. Louis Ry. Co.

Security	No.	Par Value	Rate	Due	Description
"	1	1,000	5%	1919	H. C. Frick Coke Company
"	3	1,000	5%	1920	" " "
"	9	1,000	5%	1921	" " "
"	1	1,000	5%	1949	Monongahela Light & Power Co.
"	10	1,000	3½%	1932 to 1947	U. S. Government Liberty
"	1	500	3½%	"	" " " "
	shares				
stock	50 pfd	100	6%	.....	Harbison-Walker Refractories Co.
"	10	100	....	.....	Real Estate Trust Company
"	54	25	....	.....	Peoples Natural Gas & Piping Co.
"	13	100	....	.....	Union National Bank
"	100	100	....	.....	American Sewer Pipe Co.

Money amounting to $50,000, on deposit with Union Trust Co.

PAULINE MAY [SEAL]
BARNEY MAY [SEAL]
WALTER A. MAY [SEAL]
HERBERT L. MAY [SEAL]
EDWIN C. MAY [SEAL]
LOUIS J. AFFELDER [SEAL]

Attest:
G. B. RYLAND"

EXHIBIT B.

TREASURY DEPARTMENT

Internal Revenue Service
Pittsburgh, Pa.

March 5, 1923.

Estate of PAULINE MAY, deceased.
23rd district of Pennsylvania.
Herbert L. May, Executor,
May Building,
Pittsburgh, Pa.

Enclosed find letter and notice received from the Commissioner of Internal Revenue at Washington, D. C., for transmittal to you, disclosing an additional tax liability of $5557.76 due from this estate.

This amount, $5557.76, should be paid into this office within thirty days after receipt of this letter, as Section 407, Title IV of the Act of February 24, 1919, provides that the excess part of the tax bears interest at the rate of ten per centum per annum from the expiration of thirty days after date of notification until payment is received by the Collector.

Very truly yours,

(signed) D. B. HEINER,
Collector.

GCJ:GP.
enc.

TREASURY DEPARTMENT

Washington

March 2, 1923.

ET—896—AD
District of 23rd Pennsylvania
Estate of Pauline May
Tax Liability $5,557.76.
Barney May, *et al.*, Executors,
Estate of Pauline May,
Care of Collector,
Pittsburgh, Pa.

Sirs:

A review and audit of the return on Form 706 filed for the above named estate in connection with supplemental data obtained upon investigation discloses a total tax liability of $8,026.99.

The return shows a tax liability of $2,469.23, which has been paid. The amount due is $5,557.76 which should be paid to the Collector of Internal Revenue at Pittsburgh, Pennsylvania, within thirty days after receipt of this letter, as Section 407, Title IV of the Act of February 24, 1919, provides that the excess part of the tax bears interest at the rate of ten per centum per annum from the expiration of thirty days after date of notification until payment is received by the Collector.

On the second sheet of this communication is a complete summary of the returned and determined values placed upon the property and also the claimed and allowed deductions. Following the summary is an explanation of the changes made.

Date of death—March 25, 1920.

SUMMARY

GROSS ESTATE:

	Returned (706)	Determined on review
Real estate	$ 14,800.00	$ 16,500.00
Stocks and bonds	93,464.17	93,376.17
Mortgages, notes, cash and insurance	39,814.06	39,814.06
Other miscellaneous property	37,382.64	37,382.64
Transfers	20,800.00	183,889.18
Powers of appointment	.....	.....
Property indentified as taxed within five years	.....	.....
Total gross estate	$206,260.87	$370,962.05

DEDUCTIONS:

Funeral expenses	1,764.00	1,764.00
Administration expenses		
Executor's fee	.....	.....
Attorney's fee	750.00	750.00
Miscellaneous	95.02	83.02
Debts of decedent	5,190.32	5,190.32
Unpaid mortgages	.....	.....
Net losses during settlement	.....	.....
Support of dependents	.....	.....
Property identifies as taxed within five years	.....	.....
Charitable, public, and similar bequests	.....	.....

	Returned (706)	Determined on review
Specific exemption (resident decedents only)	50,000.00	50,000.00
Total	$ 57,799.34	$ 57,787.34
Net estate for tax	$148,461.53	$313,174.69
Total tax	2,469.23	8,026.99
Additional tax due		5,557.76

The changes as indicated below show the specific adjustments, as determined by this Bureau, in accordance with the Estate Tax Law.

GROSS ESTATE:

	Returned	Determined
Real Estate		
Item 1,	$ 14,800.00	$ 16,500.00
Stocks and Bonds		
Item 2,	8,976.00	8,971.00
Item 4,	22,430.00	22,440.00
Item 7,	4,630.50	4,537.50

Transfers

The value of the following described property transferred by decedent in her lifetime is included in her gross estate, it having been determined after careful consideration of all the facts that such transfers are taxable

	Returned	Determined
under the Federal Estate Tax Law.		
Transfer by decedent by trust created October 1, 1917	.....	0,000.00
Pittsburgh, Bessemer & Lake Erie Railroad Company, 5's	.....	3,000.00
$4,000 Union Pacific Railway Company 4's	.....	3,280.00
$1,000 Union Pacific Railway Company 4's	.....	820.00
$5,000 Chicago Union Station 4½'s	.....	4,000.00
$5,000 Swiss Conferation, 5's	.....	5,000.00
$6,000 Philadelphia Company, 5's	.....	5,400.00
$5,000 Pennsylvania Railroad Company, 4½'s	.....	4,006.25
$5,000 Toronto, Hamilton and Buffalo Railroad Company, 4's	.....	3,450.00
$5,000 Allegheny County 4's	.....	4,800.00
$5,000 United Kingdom of Great Britain and Ireland 5's	.....	4,750.00
$10,000 United Kingdom of Great Britain and Ireland 5½'s,	.....	9,500.00
$5,000 Dominion of Canada 5's	.....	4,550.00
$5,000 West Virginia and Pittsburgh Railway Company 4's	.....	3,000.00

	Returned	Determined
$10,000 Jones and Laughlin Steel Company, 5's	.....	9,300.00
$5,000 Government of Argentina, 6's	.....	3,700.00
$5,000 Standard Varnish Works, 6's	.....	5,000.00
$5,000 P. C. C. & St. Louis Railroad, 4½'s	.....	4,250.00
$13,500 H. C. Frick Coke Company, 5's	.....	12,350.00
$1,000 Monongahela Light and Power Company, 5's	.....	820.00
$10,500 United States First Liberty Loan	.....	10,237.50
50 Shares Harbison Walker Refactories Company	.....	5,000.00
10 shares Real Estate Trust Company	.....	1,200.00
50 shares Peoples Natural Gas and Piping Company,	.....	2,025.00
13 shares Union National Bank	.....	3,315.00
100 shares American Sewer Pipe Company,	.....	9,300.00
Accrued income on above,	.....	1,813.64
Cash advanced by agreement March 22, 1920, for purchase of property on Penn Avenue, E. E., Pittsburgh,	.....	33,000.00
Accrued interest thereon,	.....	13.75

DEDUCTIONS:

	Determined	Returned
Miscellaneous administration expenses,	83.02	95.02
Difference between net estate returned and determined to balance	164,713.18	.....

Miscellaneous administration expenses are deducted in the amount found upon investigation to be correct.

This letter represents the final audit of the Bureau. All questions relating to the payment of this tax should be taken up direct with the collector and not with this office.

Respectfully,

(Signed) MCKENZIE MOSS,
Deputy Commissioner.

AMB.

EXHIBIT "C."

CLAIM FOR
ABATEMENT OF TAX ASSESSED

IMPORTANT

File with Collector of Internal Revenue where assessment was made. Not acceptable unless completely filled in.

NOTICE TO COLLECTOR

Collector must indicate in block above the kind of claim, except in Income Tax cases.

State of Pennsylvania,
County of Allegheny. } *ss:*

ESTATE OF PAULINE MAY, DECEASED

c/o Herbert L. May, et al., Executors,

May Building, Pittsburgh, Pa.

This deponent, being duly sworn according to law, deposes and says that this statement is made on behalf of the taxpayer named, and that the facts given below with reference to said statement are true and complete:

1. Business in which engaged.
2. Character of assessment or tax. Additional Estate Tax.
3. Amount of assessment or stamps purchased $5,557.76
4. Reduction of Tax Liability requested (Income and Profits Tax) .....
5. Amount to be abated 5,524.42

6. Amount to be refunded (or such greater amount as is legally refundable) .....
7. Dates of payment (see Collector's receipts or indorsements of canceled checks)

(If statement covers income tax liability, items 8-11, inclusive, must be answered.)

8. District in which return (if any) was filed. 23rd District of Pennsylvania.
9. District in which unpaid assessment appears.
10. Amount of overpayment claimed as credit .....
11. Unpaid assessment against which credit is asked; period from to .....

Deponent verily believes that this application should be allowed for the following reasons:

The additional assessment, to the extent of the above mentioned sum of $5524.42, is based upon the following: The executors, in their return, (Form 706) reported on Schedule E "Transfers" property to the extent of $20,800, and attached thereto as Exhibit No. 1, copies of a trust created by decedent by two instruments, said instruments being dated, respectively, May 15, 1917 and October 1st, 1917. The Commissioner of Internal Revenue, upon a review and audit of the return, included in the property to be returned under Schedule E, property subject to said trust, amounting to $163,089.18, and determined the total of Schedule E to be $183,889.18. There were some other minor changes made, against which the taxpayers are making no formal complaint, although they believe them to be erroneous, for the reason that they do not justify a controversy.

Deponent avers that the amount returned on Schedule E in said return, is correct, and that the amount

as determined by the Commissioner is incorrect, for the reason that the said trust was not in contemplation of or intended to take effect in possession or enjoyment, at or after the decedent's death, and, in support thereof, the taxpayers file herewith and make part hereof, the brief of Sachs & Caplan, Attorneys for the estate. Power of Attorney is filed herewith.

(Signed) EDWIN C. MAY.

Sworn to and subscribed before me this 29th day of March, 1923.

(Signed) DOROTHY C. PAULIN,
N. P.

EXHIBIT "D."

TREASURY DEPARTMENT

Internal Revenue Service
Pittsburgh, Pa.

May 3, 1923.

Estate of PAULINE MAY,
23rd district of Pennsylvania.
Edwin C. May, Executor,
May Building,
Pittsburgh, Pa.

Sirs:

Enclosed find letter from the Commissioner of Internal Revenue at Washington, for transmittal to you, relative to your claim for the abatement of $5524.42 of the additional estate tax disclosed by Bureau letter of March 2, 1923. You will note the action taken by the Commissioner relative to your claim, and that same has been rejected in full.

The amount of the claim rejected, $5524.42 should be paid into this office without further delay, together with interest at the rate of 10% per annum from April 5, 1923, until paid.

Very truly yours,

D. B. HEINER,
Collector.
(G. C. H.)

GCJ* :GP.
enc.—

EXHIBIT "E."

CLAIM FOR
REFUND OF TAXES ILLEGALLY COLLECTED

IMPORTANT

File with Collector of Internal Revenue where assessment was made. Not acceptable unless completely filled in.

NOTICE TO COLLECTOR

Collector must indicate in block above the kind of claim, except in Income Tax cases.

State of Pennsylvania,
County of Allegheny. } *ss:*

ESTATE OF PAULINE MAY, DECEASED

c/o Herbert L. May, et al., Executors,
May Building, Pittsburgh, Pa.

This deponent, being duly sworn according to law, deposes and says that this statement is made on be-

half of the taxpayer named, and that the facts given below with reference to said statement are true and complete:

1. Business in which engaged.
2. Character of assessment or tax.
3. Amount of assessment or stamps purchased $5,763.82
4. Reduction of Tax Liability requested (Income and Profits Tax).
5. Amount to be abated.
6. Amount to be refunded (or such greater amount as is legally refundable) 5,763.82
7. Dates of payment (see Collector's receipts or indorsements of canceled checks) September 11th, 1923.

(If statement covers income tax liability, items 8-11, inclusive, must be answered).

8. District in which return (if any) was filed.
9. District in which unpaid assessment appears.
10. Amount of overpayment claimed as credit.
11. Unpaid assessment against which credit is asked; period from to .....

Deponent verily believes that this application should be allowed for the following reasons:

The additional assessment, to the extent of $5,524.42, with interest, making a total of $5,763.82, is based upon the following: The executors, in their return (Form 706) reported on Schedule E "Transfers" property to the extent of $20,800, and attached thereto as Exhibit No. 1, copies of a trust created by decedent by two instruments, said instruments being dated, respectively, May 15, 1917 and October 1st, 1917.

The Commissioner of Internal Revenue, upon a review and audit of the return, included in the property to be returned under Schedule E, property subject to said trust, amounting to $163,089.18, and determined the total of Schedule E to be $183,889.18. Deponent avers that the amount returned on Schedule E in said return is correct, and that the amount as determined by the Commissioner is incorrect for the reason that the said trust was not in contemplation of or intended to take effect in possession or enjoyment, at or after the decedent's death.

(Signed) EDWIN C. MAY,
One of the Executors.

Sworn to and subscribed before me this 5th day of November, 1923.

(Signed) DOROTHY C. PAULIN,
Notary Public.

EXHIBIT "F."

WASHINGTON

February 20, 1924.

ET—896—61.R—PEM
District of 23rd Pennsylvania,
Estate of Pauline May,
Date of Death—March 25, 1920.
Herbert L. May, et al., Executors,
Estate of Pauline May
May Building,
Pittsburgh, Pa.

Sirs:

The Bureau has examined the claim filed by you on behalf of the above named estate for refund of

$5,763.82 of the Federal estate tax paid under the Revenue Act of 1918.

Your protest is directed against the inclusion in the decedent's gross estate of certain property which was the subject of a trust fund established by the decedent. The facts relative to this matter are as follows:

The trust was created by written instruments executed by decedent May 15, 1917, and October 1, 1917. The decedent died March 25, 1920. These trust instruments provided that the trustees pay to Barney May, who was the husband of the decedent, the net income for life, and after his death, to Pauline May for life, if she survive him, and after the death of both, the said trust fund was to be divided equally between the sons and daughters of the decedent.

It is contended by the executors that this trust was not created by the decedent in contemplation of, or intended to take effect in possession or enjoyment at or after death.

This trust was included in decedent's gross estate on final audit and review on the ground that it was intended to take effect in possession or enjoyment at or after death. In this case the principal of the trust fund could not take effect in possession until the death of the decedent. According to the provisions of the trust agreement, if the decedent's husband died before her, the income was to be paid to her until her death. The gift of the principal, therefore, could not take effect during the decedent's lifetime. This case comes literally within the terms of the statute, and it has been held by a number of courts in different States that such a transfer as this is taxable, these cases being

decided under statutes using the same language as is contained in the Federal Estate Tax Law.

It is therefore the opinion of the Bureau that the transfers involved were properly included in the decedent's gross estate.

In view of the foregoing, your claim for refund of $5,763.83 is rejected in full.

Respectfully,

(Signed) D. H. BLAIR,
Commissioner.

NDL

Motion to Strike.

Filed August 3, 1925.

And now, August 3, 1925, comes the defendant in the above case and excepts to the plaintiff's statement filed herein and moves the Court to strike the same from the record for the following reasons:

1. That the trust created by the decedent in her life time as set forth is properly included in the decedent's gross estate under the provisions of Section 402 (c) of the Revenue Act of 1918.

2. And for other good and sufficient reasons to be set forth at the hearing of this motion.

JOHN D. MEYER.

Opinion.

Filed January 12, 1928.

THOMSON, J.:

This is an action brought to recover an additional Federal Estate Tax, on the ground of its illegal assessment and collection under the provisions of the Revenue Act of 1918.

The plaintiffs having filed their statement and amended statement of claim, an affidavit of defense was filed raising questions of law, which are before the Court for determination. The decision of this case has been greatly delayed due to a combination of causes not essential to state.

Pauline May died on March 25, 1920. Having executed a paper declaring her intention to create a trust, under a formal instrument to be drawn for that purpose, she did, on October 1, 1917, execute such instrument. The question, therefore, arises, whether such trust, created by the decedent more than two years prior to her death, was created in contemplation of, or intended to take effect in possession or enjoyment, at or after her death. After assigning certain property to the trustees, and giving them full power and authority to deal with the same, she directed the trustees as follows:

> "To pay the net dividends, interest and income thereof, after payment of all taxes, costs and expenses incurred by them in their discretion, in the performance of the duties hereunder; to Barney May during his lifetime, and after his decease, to Pauline May during her lifetime, and after her decease, all the property in said Trust,

in whatever form or shape it may be, shall, after the expenses of the Trust have been deducted or paid, be distributed equally among Walter A. May, Herbert L. May, Edwin C. May and Estelle May Affelder, children of the said Pauline May and Barney May, and in case any of such children be deceased, then as such deceased child shall appoint by his or her last will and testament, or by other written instrument, directed to the trustees, and duly witnessed, and in default of such appointment, to the heirs of such deceased child, per stirpes."

The material part of the Revenue Act of 1918, is as follows:

"Sec. 402. That the value of the gross estate of the decedent shall be determined by including the value at the time of his death of all property, real or personal, tangible or intangible, wherever situated. * * *

(c) To the extent of any interest therein of which the decedent has at any time made a transfer, or with respect to which he has at any time created a trust, in contemplation of or intended to take effect in possession or enjoyment at or after his death (whether such transfer or trust is made or created before or after the passage of this Act), except in case of a bona fide sale for a fair consideration in money or money's worth. Any transfer of a material part of his property in the nature of a final disposition or distribution thereof, made by the decedent within two years prior to his death without such a consideration, shall, unless shown to the contrary, be

deemed to have been made in contemplation of death within the meaning of this title * * *"

From the plain language of the trust, the donor gave the income of the fund to her husband for life, and the corpus of the fund to her children; but the gift of the corpus is effective only after the death of Mrs. May, the donor. In this case, it was the gift of the corpus of the fund which was included in valuing the gross estate. The gift becomes the legal, as distinguished from the equitable, property of the children only after the death of the donor of the trust.

It is certainly true, that the property covered by the gift included in the gross estate, came into the possession or enjoyment of the donees only after the death of the donor. It seems to be settled by the authorities that the phrase "to take effect in possession or enjoyment at, or after death", is used to designate a situation in which the donee's rights with respect to the property (as distinguished from an estate or interest in the property) changed at, or after, and because of, the donee's death. It is perfectly clear that the donor, by adopting a trust form of conveyance, manifested her intention that the property should not come into the present possession of the beneficiaries. By providing in effect, for the termination of the trust after death, the possession is made to take effect at that time. While it is true that the trust may be said to take effect in enjoyment at once, the settler, by imposing the trust, has made a transfer of the corpus which not only was intended to, but actually does, take effect in possession after death. From its very nature, a trust deprives the beneficiaries

of possession as long as the trust continues. The mere receipt of income does not constitute possession, or enjoyment, within the meaning of the statute. In order to escape the statute, the donee must be in actual possession and enjoyment of the property before death. It has been so held, in the case of *Vanderbilt v. Eidman,* 196 U. S. 480; in dealing with the inheritance tax imposed by the Act of 1898, the Supreme Court, at page 491, said:

> "It will be observed that the duties imposed in Section 29 have relation to two classes, first, legacies or distributive shares passing by death and arising from personal property; and, second, any personal property or interest therein transferred by deed, grant, bargain, sale or gift, to take effect in possession or enjoyment after the death of the grantor or bargainor, in favor of any person or persons, or to any body or bodies, politic or corporate, in trust or otherwise. As to this second class, the Statute specifically makes the liability for taxation depend, not upon the mere vesting in a technical sense of title to the gift, but upon the actual possession or enjoyment thereof. * * *"

The possession of property means that,

> "* * * The property, together with all the attributes of ownership, must pass from the donor, to take effect independently of his death."

Re—*Fulham's Estate,* 96 Vt. 308.

One of the attributes of ownership is the right to dispose not only of the income, but the corpus of the property. Another attribute, is the right to use the property. Neither of these attributes are present

here. The donees could not use the property until the founder of the trust died. It seems manifest in this case, that the founder intended that the possession and enjoyment of the corpus of the trust fund should be postponed until after her death. To prevent the beneficiaries from having control of the corpus until that time, was the very purpose for which the trust was created. The authorities seem to establish, that it is only when the beneficiaries have the use and disposal of the property, independently of, and without reference to, the donor's death, that the gift escapes the taxation imposed by the statute.

In re—Waugh, 78 Pa., 436;
State Street Trust Co. v. Stevens, 209 Mass. 373;
In re—Bottomley's Estate, 92 N. J. Eq., 202;
In re—Egerton's Estate, 170 N. Y. S., 223.

It appears wholly immaterial that the donor may retain no interest whatever in the fund. Almost conclusive evidence of this position, is the fact that Congress included in the same section, gifts made in contemplation of death. These necessarily vested title and exclusive enjoyment in the donee prior to death. Both before and after the passage of the Federal Act, the Courts held that the reservation of income was not important. In the case of *Shukert v. Allen,* 6 Fed 2nd, 551, Shukert retained no interest whatever in either the income, or the corpus of the property. He had created, during his life, a trust which provided that the income should be accumulated, and the fund with the accumulations, should be distributed amongst his children, or the survivors after

his death. The Circuit Court of Appeals of the Eighth Circuit, held that the trust was not intended to take effect in possession or enjoyment at, or after the death, within the meaning of the statute.

To the same effect is *Coolidge v. Nicholas,* 4 Fed. 2nd, 112. Many State cases are to the same effect. In the case of *Re Edwards,* 32 N. Y. S., 901, there was a gift *causamortis,* of several savings bank books and the deposits which they represented. The Court held the gift taxable, not because of any interest retained by the donor, but because full enjoyment did not vest in the donee. The Court said:

> "Mrs. Abbott, the donee, could have no possession or enjoyment of the principal until after his death. The fact that she had the possession and enjoyment of the income in his life time, makes no difference."

The persons who were to take the corpus could not be determined until after the founder's death. How could it be said, therefore, that either the property or an estate therein, is in possession or enjoyment at a time when the person who is to own the property, is not ascertained.

In conclusion, both from the wording of the statute itself and from the authorities, both Federal and State, it seems clear that the value of the corpus of the trust funds was properly included in the gross estate of the decedent, because they constituted property with respect to which the decedent made transfers, intended to take effect in possession or enjoyment at or after her death.

It follows, therefore, that the questions of law

raised by the affidavit of defense must be found in favor of the defendant.

ORDER.

And now, to wit, January 12th, 1928, for the reasons set forth in the foregoing opinion, judgment is directed to be entered in favor of the defendant on the questions of law raised by the affidavit of defense.

W. H. S. THOMSON.

Assignment of Error.

Filed February 25, 1928.

The Court erred in entering the following judgment and order on the affidavit of defense filed by defendant, raising questions of law, said order being as follows:

ORDER.

"And now, to wit, January 12th, 1928, for the reasons set forth in the foregoing opinion, judgment is directed to be entered in favor of the defendant on the questions of law raised by the affidavit of defense.

BY THE COURT."

Stipulation for Printing Record.

Filed February 25, 1928.

And now, to-wit, February 25th, 1928, it is hereby stipulated and agreed between counsel for plaintiff and counsel for defendant that the following be printed as and constitute the record on writ of error in the above case before the United States Circuit Court of Appeals for the Third Circuit, viz:

1. Docket entries;
2. Statement of Claim;
3. Affidavit of Defense;
4. Opinion of court filed January 12th, 1928;
5. Assignment of errors;
6. This stipulation.

SACHS & CAPLAN,
Attorneys for Plaintiffs.
W. J. AIKEN,
Asst. U. S. Attorney,
Attorney for Defendant.

Certificate of Probable Cause.

Filed May 3, 1928.

And now, on this 3rd day of May, 1928, the Court, having been fully advised in the premises, hereby certifies that inasmuch as it appears of record in this case that the Collector of Internal Revenue was acting pursuant to instructions from the Commissioner of Internal Revenue, there was probable cause for the collection of federal taxes and interest thereon from the plaintiff, as shown by the record in this cause.

R. M. GIBSON,
United States District Judge.

Certificate.

Western District of Pennsylvania, ss:

I, J. Wood Clark, Clerk of the District Court of the United States for the Western District of Pennsylvania, do hereby certify that the annexed and foregoing pages contain a true and correct copy of the record in Error in the above entitled case, so full and entire as the same remains of record and on file in my office, in the City of Pittsburgh, in said District.

IN TESTIMONY WHEREOF, I have hereunto signed my name and affixed the seal of the said Court, at Pittsburgh, this ..... day of ....., A. D. 1928.

J. WOOD CLARK,
Clerk.

Minute entry of argument and submission November 8, 1928, omitted in printing.

IN UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT, OCTOBER TERM, 1928

No. 3811

WALTER A. MAY, HERBERT L. MAY, EDWIN C. MAY, and Louis J. Affelder, Executors of the Last Will and Testament of Pauline May, Deceased, Plaintiffs-Appellants,

vs.

D. B. HEINER, Collector of Internal Revenue, Defendant-Appellee

On Appeal from the District Court of the United States for the Western District of Pennsylvania

Before Buffington, Woolley, and Davis, Circuit Judges

OPINION—Filed Jan. 9, 1929

Per CURIAM:

Affirmed on the opinion of the court below with the observation that this case is distinguished from Nichols vs. Coolidge, 274 U. S. 531, on the facts.

[File endorsement omitted.]

IN UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT, OCTOBER TERM, 1928

No. 3811 (List No. 44)

W. A. MAY et al., Executors Pauline May, Dec'd, Appellants,

vs.

D. B. HEINER, Collector, Appellee

Appeal from the District Court of the United States for the Western District of Pennsylvania

DECREE—Filed Jan. 9, 1929

This cause came on to be heard on the transcript of record from the District Court of the United States for

the Western District of Pennsylvania and was argued by counsel.

On consideration whereof, it is now here ordered, adjudged, and decreed by this Court that the decree of the said District Court in this cause be, and the same is hereby, affirmed.

Philadelphia, January 9, 1929.

Per Curiam:

Buffington, Circuit Judge.

[File endorsement omitted.]

Petition for rehearing, covering 11 pages, filed January 18, 1929, omitted from this print. It was denied and nothing more by order June 24, 1929.

In United States Circuit Court of Appeals for the Third Circuit, October Term, 1928

No. 3811 (List No. 44)

W. A. May et al., Exrs. Pauline May, Dec'd, Appellants,

vs.

D. B. Heiner, Collector, Appellee

Order Denying Rehearing—Filed June 24, 1929

And now, to wit, June 24, 1929, after due consideration, the petition for rehearing in the above-entitled case is hereby denied.

Philadelphia, June 24, 1929.

Per Curiam:

Buffington, Circuit Judge.

[File endorsement omitted.]

Clerk's certificate to foregoing transcript omitted in printing.

SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed October 21, 1929

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Third Circuit is granted. And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

Endorsed on cover: File No. 34,442. U. S. Circuit Court of Appeals, Third Circuit. Term No. 311. Walter A. May, Herbert L. May, Edwin C. May, et al., executors of the last will and testament of Pauline May, deceased, petitioners, vs. D. B. Heiner, Collector of Internal Revenue for 23rd District of Pennsylvania. Petition for writ of certiorari and exhibit thereto. Filed August 8, 1929. File No. 34,442.

FILE COPY

AUG 8 19
CHARLES ELMORE

IN THE

Supreme Court of the United States

OCTOBER TERM, 1929

NO. 311

WALTER A. MAY, HERBERT L. MAY, EDWIN C. MAY and LOUIS J. AFFELDER, Executors of the Last Will and Testament of PAULINE MAY, Deceased, Petitioner,

v.

D. B. HEINER, Collector of Internal Revenue for 23rd District of Pennsylvania, Respondent.

PETITION FOR WRIT OF CERTIORARI AND BRIEF IN SUPPORT THEREOF.

CHARLES H. SACHS,
LOUIS CAPLAN,
Counsel for Petitioner.

328 Frick Building,
Pittsburgh, Pa.

SMITH BROS. CO. INC., LAW PRINTERS, 209-213 GRANT STREET, PITTSBURGH, PA.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1929

NO. .....

WALTER A. MAY, HERBERT L. MAY, EDWIN C. MAY and LOUIS J. AFFELDER, Executors of the Last Will and Testament of PAULINE MAY, Deceased, Petitioner,

v.

D. B. HEINER, Collector of Internal Revenue for 23rd District of Pennsylvania, Respondent.

PETITION FOR WRIT OF CERTIORARI AND BRIEF IN SUPPORT THEREOF.

To the Honorable, the Chief Justice and the Associate Justices of the Supreme Court of the United States:

The petition of Walter A. May, Herbert L. May, Edwin C. May and Louis J. Affelder, Executors of the Last Will and Testament of Pauline May, deceased, respectfully shows:

Summary Statement of the Matter Involved.

The matter involved is whether, under Sec. 402 (c) of the Revenue Act of 1918, petitioners are required to include in the gross estate of decedent the value of the corpus of an

irrevocable trust created by the decedent, not in contemplation of death, which provided for the payment of the income thereof to decedent's husband, during his lifetime, and after his decease to decedent, during her lifetime, and for the distribution, after their decease, of all of the property in said trust among decedent's children, decedent's husband having survived her.

This is an action at law for the recovery of $5,763.82 with interest, estate taxes, collected by duress by the respondent.

Plaintiffs' testatrix died in the City of Pittsburgh, Pennsylvania on the 25th day of March, 1920. Her executors filed an estate tax return in which they disclosed a net estate for taxes of $148,461.53, on which there was a tax due of $2,469.23. The Commissioner of Internal Revenue made a demand for the payment of additional taxes amounting to $5,557.76, based, in the main, upon the inclusion by the Commissioner of certain property concerning which the testatrix made a trust, for the alleged reason that the trust was in contemplation of or intended to take effect in possession or enjoyment at or after the testatrix's death.

The testatrix made two declarations of trust, one dated May 17, 1917 (R. 12), in which it was recited that whereas the decedent holds certain property consisting of bonds, stocks, notes and money in bank, of a market value of about $150,000, which were purchased largely with the funds of her husband, Barney May, and she desires to place them in trust, as thereinafter mentioned, wherefore she transfers and assigns said property to B. May (who was her husband), W. A. May, H. L. May, E. C. May and L. J. Affelder, as trustees, the said trustees to pay to B. May the net income for life, and after his death, to Pauline May for life, if she survive him; and after the death of both of them, the said property is to be divided equally between her sons and daughter, W. A. May, Estelle M. Affelder, H. L. May

and E. C. May; all of which will appear in a formal instrument of trust to be drawn up, listing the said property, and to be duly executed by her.

The other was an agreement dated October 1st, 1917, (R. 13), between the decedent of the one part, and said trustees, wherein she transferred and assigned to said trustees the property therein mentioned, in trust, to collect the income, etc., and to pay the net dividends "to Barney May during his lifetime, and after his decease, to Pauline May during her lifetime, and after her decease, all of the property in said trust * * * shall * * * be distributed equally among" her above named children.

Barney May survived his wife, and the estate tax return was made by him and the other executors named in her will.

Petitioners paid to respondent the sum of $33.34 additional tax due by reason of certain minor changes made in valuations, and made a claim for abatement of the balance of $5,524.42 of said additional tax assessment (R. 24). The said claim for abatement was rejected, and petitioners, upon demand of respondent, paid to respondent the sum of $5,524.42, together with interest at the rate of 10% per annum from April 5th, 1923, or a total of $5,763.82.

After petitioners filed a claim for refund (R. 27), which was rejected, they brought suit to recover the last mentioned sum with interest.

The respondent filed a motion to strike petitioners' statement of claim from the record, for the reason that the trust created by the decedent is properly included in the decedent's gross estate, under the provisions of Sec. 402 (c) of the Revenue Act of 1918 (R. 31).

The District Court held that the property covered by the trust constituted property with respect to which the decedent made transfers intended to take effect in possession or enjoyment at or after death, and directed judgment to be entered in favor of respondent on the question of law raised by the pleadings (25 F. (2d) 1004).

Petitioners appealed from said order to the Circuit Court of Appeals, which, in a per curiam, affirmed "on the opinion of the court below with the observation that this case is distinguished from *Nichols v. Coolidge*, 274 U. S. 531, on the facts." (32 F. (2d) 1017).

A petition for rehearing was filed for the reason that the question involved in this case was decided by this Court in the case of *Reinecke, Collector, v. Northern Trust Company*, 278 U. S. 339, favorable to petitioner's contention, a week earlier, and that the respondent had stated in its brief that the same issue that was involved in the instant case was presented in the said Reinecke case, in the following language: "The attention of the Court is called to the fact that the issue presented by the instant case will probably be settled by the United States Supreme Court in *Reinecke, Collector, v. The Northern Trust Co.*, No. 90 (24 Fed. (2d) 91)."

The petition for rehearing was refused.

Reasons Relied on for the Allowance of the Writ.

1. The Circuit Court of Appeals erred in including in the gross estate of decedent the corpus of the trust.

2. The Circuit Court of Appeals has decided a doubtful question involving the construction of a taxing statute in favor of the Government and against the taxpayer, con-

trary to the principle of law pronounced by this Court in *Gould v. Gould,* 245 U. S. 151.

3. The Circuit Court of Appeals, in holding that the corpus of this trust should be included in the gross estate of decedent, has decided an important question of Federal law in a way probably untenable.

4. The Circuit Court of Appeals, in holding that the corpus of this trust should be included in the gross estate of decedent, has decided an important question of Federal law in a way probably in conflict with the applicable decisions of this Court.

5. The question whether there should be included in the gross estate the corpus of this trust under the provisions of the Act of 1918, is one of far reaching importance, and is also one of first impression. The matter involves a determination of an important question of general law for the guidance of all taxpayers similarly situated.

6. The question involved is of general importance. The same principles are involved in a number of cases now pending before the courts, the Board of Tax Appeals, and the Treasury Department. For the information of taxpayers generally, the question should be authoritatively determined by this Court.

Wherefore, your petitioners pray that a writ of certiorari be issued out of and under the seal of this Honorable Court directed to the United States Circuit Court of Appeals for the Third Circuit, commanding that Court to certify and to send to this Court for its review and determination, on a day certain to be therein named, a full and complete transcript of the record and all proceedings in the case numbered and entitled on its docket No. 3811 October

Term, 1928, Walter A. May, Herbert L. May, Edwin C. May and Louis J. Affelder, Executors of the Last Will and Testament of Pauline May, deceased, Appellants, v. D. B. Heiner, Collector of Internal Revenue for the 23rd District of Pennsylvania, and that the said judgment of the United States Circuit Court of Appeals for the Third Circuit may be reversed by this Honorable Court and that your petitioners may have such other and further relief in the premises as to this Honorable Court may seem meet and just; and your petitioners will ever pray.

Walter A. May, Herbert L. May, Edwin C. May and Louis J. Affelder, Executors of the Last Will and Testament of Pauline May, Deceased,

By

CHARLES H. SACHS,

LOUIS CAPLAN,
Counsel for Petitioners.

BRIEF IN SUPPORT OF PETITION.

I.

Opinions Below.

The opinion of the District Court is reported at 25 F. (2d) 1004. The opinion of the Circuit Court of Appeals is reported at 32 F. (2d) 1017.

II.

Jurisdiction.

The judgment of the Circuit Court of Appeals was entered on January 9, 1929. A petition for rehearing was filed on January 18th, 1929. The order denying the petition for rehearing was entered June 24, 1929. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925, c. 229, section 1, 43 Stat. 938.

III.

Statement of the Case.

A statement of the case appears in the petition, and, in the interest of brevity, is not repeated.

IV.

Specification of Error.

The Circuit Court of Appeals for the Third Circuit erred in holding that the value of the corpus of the trust fund should be included in the gross estate of the decedent.

V.

Argument.

THE TRANSFER IN THIS CASE WAS EFFECTIVE TO PASS THE TITLE TO THE PROPERTY AND THE ECONOMIC BENEFITS TO BE DERIVED THEREFROM IMMEDIATELY WHEN IT WAS MADE, ON OCTOBER 1ST, 1917.

There was no power reserved to revoke the transfer or trust. The economic interest was divided, of course. During the lifetime of the husband of the settlor, the income was payable to him. If he died before she did, the income went to her, during her lifetime. The remainder was transferred absolutely to the children.

The language of the statute is as follows:

> "Sec. 402. That the value of the gross estate of the decedent shall be determined by including the value at the time of his death of all property. * * * (c) to the extent of any interest therein of which the decedent has at any time made a transfer, or with respect to which he has at any time created a trust, in contemplation of or intended to take effect in possession or enjoyment at or after his death (whether such transfer or trust is made or created before or after the passage of this Act) * * *."
>
> *Revenue Act of 1918* (February 24, 1919, 40 Stat. at L. 1096, 1097, Chap. 18).

The only interest which decedent had in the property at the time of her death was her contingent life estate. Everything else she had effectually transferred. She could not, if she changed her mind, retake what she had given to her husband, a life estate in the income, and what she had given to her children, the remainder after the death of her husband and herself.

"What this law taxes is not the interest to which the legatees and devisees succeed on death, but the interest which ceased by reason of the death."

Y. M. C. A. v. Davis, 264 U. S. 47, at p. 50.

The interest which ceased by reason of Mrs. May's death was her contingent interest.

If neither the value of the life estates, nor that of the remainders, were required to be included in the gross estate in the Reinecke case (278 U. S. 339), notwithstanding the fact that the remainders were intended to take effect in possession or enjoyment at or after settlor's death, the value of the life estate given here to Barney May, settlor's husband, and the value of the remainder given to her children, should not be included in the gross estate. The circumstance that in this case there was the possibility of a life estate in favor of settlor intervening does not detract from the finality and irrevocability of the estates given to others. In the Reinecke case, the economic benefit was divided into two parts or interests. Here it *might* have been divided into three parts or interests, and only one of these interests could cease on Mrs. May's death.

The Government erroneously contended in the Reinecke case, as to the five trusts, that even without the reserved powers to manage and modify the trusts, the transfers of the *remainder* interests were all subject to the tax because, within the language of sec. 402, they were intended to take effect in possession or enjoyment at or after his death.

In denying this contention, the Court said:

"One may freely give his property to another by absolute gift without subjecting himself or his estate to a tax, but we are asked to say that this statute means that he may not make a gift *inter vivos,* equally absolute and complete, without subjecting it to a tax,

if the gift takes the form of a life estate in one, with remainder over to another, at or after the donor's death. It would require plain and compelling language to justify so incongruous a result, and we think it is wanting in the present statute."

In principle, there is no difference between the gift of a life estate to A, with remainder to B, and a gift of a life estate to A, a life estate to Z, if the latter survives A, and the remainder to B.

All that can be taxed is the value of that which the settlor did not give away, but which he retained for himself, and which passed from him to some one else upon his death. The language of this statute leans more in the direction of such a conclusion than it does to the contention of the Government. But if there is any doubt about it, the doubt should be resolved in the taxpayer's favor: *Gould v. Gould,* 245 U. S. 151.

This Court has not decided, so far as we have been able to discover, the precise question whether a reservation by the settlor of the possession and enjoyment of the income during his life in a trust or transfer created after the passage of the estate tax code authorizes the imposition of a tax on the corpus of the trust. As we read those opinions of this Court which may be said to shed a light on the question, we find that they lay down the principle that a tax attaches only in those cases where there is a shifting of the economic use and benefit of property upon the death of settlor, and that *the tax is measured by the value of the economic benefits which pass from the settlor to his successor by the settlor's death.*

There is nothing in the cases of *Chase National Bank v. U. S.,* 278 U. S. 327, or in the Reinecke case, against our position.

In the first case, the insured had full power at all times during his lifetime to dispose of the entire economic benefits or enjoyment in the life insurance policies.

In the Reinecke case, as to the two trusts, the corpus of which this Court held was taxable, the settlor reserved the right to revoke them, and upon the exercise of this right, the trustee was required to return the corpus of the trust to him. He was, therefore, during his lifetime, in the same position as if he were making gifts from time to time of the income, and without obligation to continue them. As we understand the opinion, whatever a person gives away, not in contemplation of death, is free from taxation. But it must be a real gift, without strings attached to it. The extent of the gift, the share of the economic benefit or interest given, is immaterial, providing it is a gift, an irrevocable gift, from the moment of its making.

In *Carnill v. McCaughn,* 30 F. 2d, 696, the facts as stated by the Court in its opinion (p. 697) were that the decedent made a transfer of property to a trustee, reserving to himself the income from the property during his life, the remainder going at his death to named beneficiaries. The interests of the latter were vested and absolute, and there was no power of revocation or control over the gift retained by the donor. The Court held that there is to be excluded from the taxation:

> "transfers by way of gift *of the remainder* after a life estate reserved, when the gift is not in contemplation of death, is absolute, and the decedent up to the time of his death had no power of control over it, or to direct the course of distribution of the property by his action or non-action." (Italics ours). (p. 699).

The Government stated in the Court below that it did not contend that the transfer in this case was made in contemplation of death.

The Government argued below that it must be assumed from the record that Pauline May survived her husband because the Commissioner failed to deduct the value of Barney May's life estate, and cited *United States v. Rindskopf,* 105 U. S. 418. The Government, in all fairness, should not attempt by casuistry to establish that to be a fact which it knows is not a fact, in order to gain some advantage over the taxpayer. It has available its own records in the matter of the estate tax of Barney May, which show that Barney May survived his wife. Besides, there is a letter of the Treasury Department attached to the amended statement of claim, record, page 18, which is addressed to Barney May et al., Executors, Estate of Pauline May. This shows that the estate tax return in the Pauline May Estate was made by Barney May, and the others, as executors. The will shows that the Barney May who was named as an executor was decedent's husband, and we all know that letters testamentary are not granted to a dead person. The estate tax return referred to in the statement of claim, paragraph 3, record, page 3, shows that Barney May was living and making the return. In order not to encumber the record, we did not attach to the statement of claim a copy of the entire return, but attached only the schedules that were relevant and material to the issue. The case of *U. S. v. Rindskopf,* 105 U. S., 418, cited by the Government, cannot be tortured into an authority for the false assumption that Barney May died before his wife, in view of the circumstances above set forth.

IF THE REVENUE ACT OF 1918 ACCORDING TO A CORRECT CONSTRUCTION PURPORTS TO AUTHORIZE THE TAX HERE IMPOSED, IT IS UNCONSTITUTIONAL.

Nichols v. Coolidge, 274 U. S. 531.

We respectfully submit that nothing more than a mere reading of the language of this transfer, and of sec. 402 (c) of the revenue act of 1918, will show the applicability

of the following from the opinion of this Court in the case of *Reinecke v. Northern Trust, Executors,* 278 U. S. 339:

"In the light of the general purpose of the Statute, and the language of sec. 401 explicitly imposing the tax on net estates of decedents, we think it at least doubtful whether the trusts or interests in a trust intended to be reached by the phrase in sec. 402 (subdivision c) 'to take effect in possession or enjoyment at or after his death,' include any others than those passing from the possession, enjoyment or control of the donor at his death and so taxable as transfers at death under sec. 401. That doubt must be resolved in favor of the taxpayer. *Gould v. Gould,* 245 U. S. 151. * * *"

CHAS. H. SACHS,

LOUIS CAPLAN,
Attorneys for Petitioner.

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JA
CHARLES

BRIEF FOR PETITIONERS.

Supreme Court of the United States

OCTOBER TERM, 1929

NO. 311

WALTER A. MAY, HERBERT L. MAY, EDWIN C. MAY, ET AL., Executors of the Last Will and Testament of Pauline May, Deceased, Petitioners, Appellants,

v.

D. B. HEINER, Collector of Internal Revenue for 23rd District of Pennsylvania.

On Writ of Certiorari to the United States Circuit Court of Appeals for the Third Circuit.

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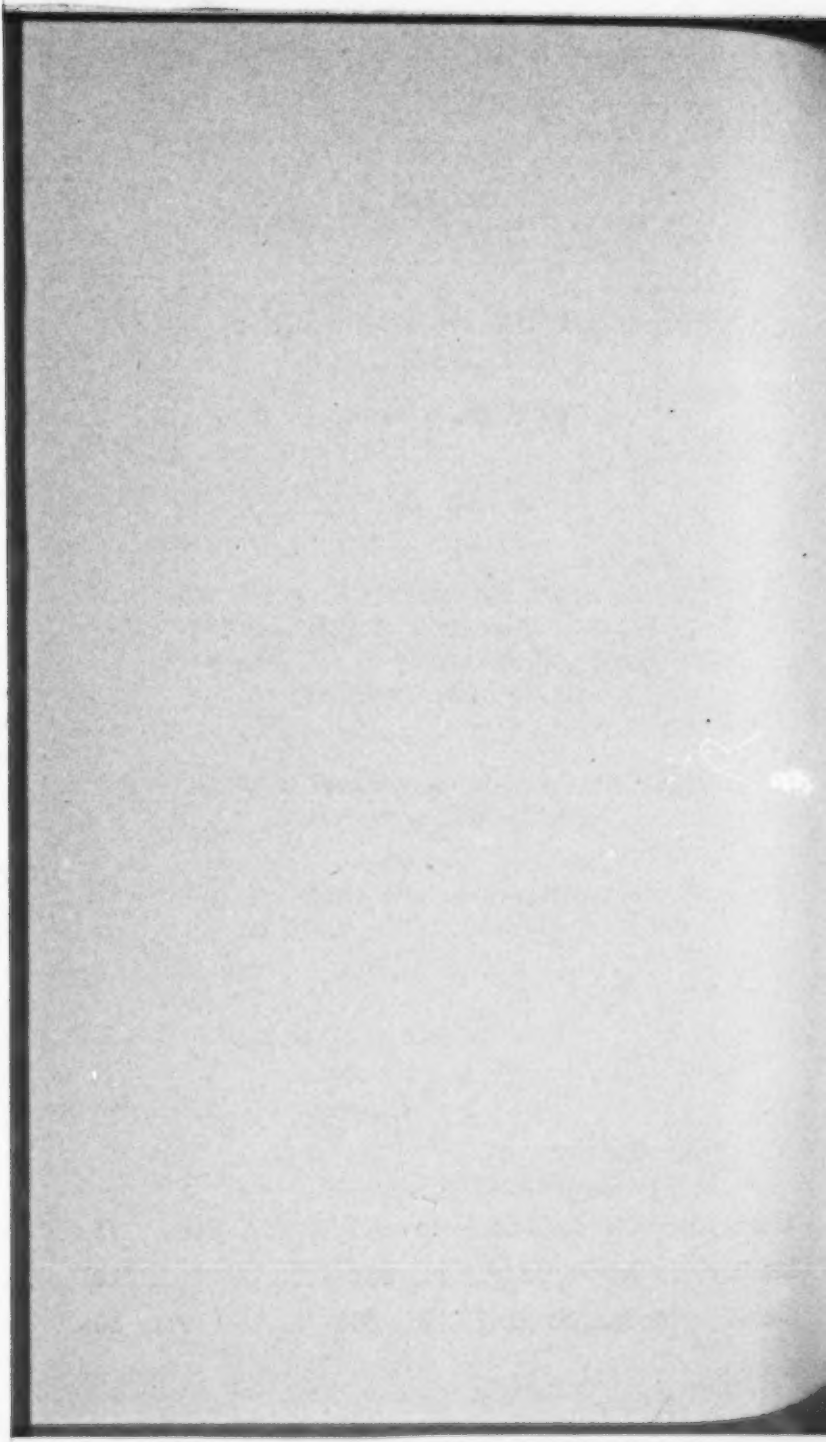

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Supreme Court of the United States

OCTOBER TERM, 1929

NO. 311

WALTER A. MAY, HERBERT L. MAY, EDWIN C. MAY, ET AL., Executors of the Last Will and Testament of Pauline May, Deceased, Petitioners, Appellants,

v.

D. B. HEINER, Collector of Internal Revenue for 23rd District of Pennsylvania.

BRIEF FOR PETITIONERS.

Opinions Below.

The opinion of the District Court (R. 32) is reported at 25 F. (2d) 1004. The opinion of the Circuit Court of Appeals (R. 41) is reported at 32 F. (2d) 1017.

Jurisdiction.

The judgment of the Circuit Court of Appeals (R. 41) was entered on January 9, 1929. A petition for rehearing (R. 42) was filed on January 18th, 1929. The order denying the petition for rehearing (R. 42) was entered June 24, 1929. Petition for certiorari was filed August 8th, 1929, and granted October 21, 1929, (R. 43) under the provisions of Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925, c. 229, section 1, 43 Stat. 938. The respon-

dent filed a memorandum in which it stated that it did not oppose the petition for certiorari.

This was an action at law brought by petitioners against the respondent in the District Court (R. 2) to recover a sum assessed against them under the Revenue Act of 1918, for additional Federal Estate Tax. To petitioners' statement of claim (R. 2), the respondent filed a motion (R. 31) to strike the statement of claim from the record. The District Court, in an opinion (R. 32), and order (R. 38), entered judgment in favor of respondent on the question of law raised by the motion.

The Questions Presented.

The case presents the question, first, whether the corpus of an irrevocable trust created by the decedent in 1917, not in contemplation of death, which provided for the payment of the income thereof to decedent's husband, during his lifetime, and after his decease, to decedent, during her lifetime, and for the distribution, after their decease, of all of the property in said trust among decedent's children, decedent's husband having survived her, is property transferred, or with respect to which a trust was created, intended to take effect in possession or enjoyment at or after her death, under the provisions of the Revenue Act of 1918.

If that question be answered in the affirmative, it presents the next question, whether the Revenue Act of 1918, so construed, is constitutional.

The Statute.

The Revenue Act of 1918, c. 18, 40 Stat. 1096, 1097, provides as follows:

> "Sec. 402. That the value of the gross estate of the decedent shall be determined by including the value at the time of his death of all property * * * (c) to the extent of any interest therein of which the decedent has at any time made a transfer, or with respect to which he has at any time created a trust, in contemplation of or intended to take effect in possession or enjoyment at or after his death (whether such transfer or trust is made or created before or after the passage of this Act) * * *."

Statement.

This is an action at law for the recovery of $5,763.82 with interest, estate taxes, collected by duress by the respondent.

Petitioners' testatrix died in the City of Pittsburgh, Pennsylvania on the 25th day of March, 1920. Her executors filed an estate tax return in which they disclosed a net estate for taxes of $148,461.53, on which there was a tax due of $2,469.23. The Commissioner of Internal Revenue made a demand for the payment of additional taxes amounting to $5,557.76, based, in the main, upon the inclusion by the Commissioner of certain property concerning which the testatrix made a trust, for the alleged reason that the trust was in contemplation of or intended to take effect in possession or enjoyment at or after the testatrix's death.

The testatrix made two declarations of trust, one dated May 17, 1917 (R. 12), in which it was recited that whereas the decedent holds certain property con-

sisting of bonds, stocks, notes and money in bank, of a market value of about $150,000, which were purchased largely with the funds of her husband, Barney May, and she desires to place them in trust, as thereinafter mentioned, wherefore she transfers and assigns said property to B. May (who was her husband), W. A. May, H. L. May, E. C. May and L. J. Affelder, as trustees, the said trustees to pay to B. May the net income for life, and after his death, to Pauline May for life, if she survive him; and after the death of both of them, the said property is to be divided equally between her sons and daughter, W. A. May, Estelle M. Affelder, H. L. May and E. C. May; all of which will appear in a formal instrument of trust to be drawn up, listing the said property, and to be duly executed by her.

The other was an agreement dated October 1st, 1917, (R. 13), between the decedent of the one part, and said trustees, wherein she transferred and assigned to said trustees the property therein mentioned, in trust, to collect the income, etc., and to pay the net dividends "to Barney May during his lifetime, and after his decease, to Pauline May during her lifetime, and after her decease, all of the property in said trust * * * shall * * * be distributed equally among" her above named children.

Barney May survived his wife, and the estate tax return was made by him and the other executors named in her will.

Petitioners paid to respondent the sum of $33.34 additional tax due by reason of certain minor changes made in valuations, and made a claim for abatement of the balance of $5,524.42 of said additional tax assessment (R. 24.) The said claim for abatement was rejected, and petitioners, upon demand of respondent, paid to respondent the sum of $5,524.42, together

with interest at the rate of 10% per annum from April 5th, 1923, or a total of $5,763.82.

After petitioners filed a claim for refund (R. 27), which was rejected, they brought suit to recover the last mentioned sum with interest.

The respondent filed a motion to strike petitioners' statement of claim from the record, for the reason that the trust created by the decedent is properly included in the decedent's gross estate, under the provisions of Sec. 402 (c) of the Revenue Act of 1918 (R. 31).

The District Court (R. 32), held that the property covered by the trust constituted property with respect to which the decedent made transfers intended to take effect in possession or enjoyment at or after death, and directed judgment to be entered in favor of respondent on the question of law raised by the pleadings (25 F. (2d) 1004).

Petitioners appealed from said order to the Circuit Court of Appeals, which, in a per curiam, (R. 41), affirmed "on the opinion of the court below with the observation that this case is distinguished from *Nichols v. Coolidge,* 274 U. S. 531, on the facts." (32 F. (2d) 1017).

A petition for rehearing was filed for the reason that the question involved in this case was decided by this Court in the case of *Reinecke, Collector, v. Northern Trust Company,* 278 U. S. 339, favorable to petitioner's contention, a week earlier, and that the respondent had stated in its brief that the same issue that was involved in the instant case was presented in the said Reinecke case, in the following language: "The attention of the Court is called to the fact that the issue presented by the instant case will probably be settled by the United States Supreme Court in

Reinecke, Collector, v. The Northern Trust Co., No. 90 (24 Fed. (2d) 91)."

The petition for rehearing was refused (R. 42).

Specifications of Error to Be Urged.

The petitioners contend that the Circuit Court of Appeals, Third Circuit, erred:

1. In affirming the judgment of the District Court of the United States for the Western District of Pennsylvania.

2. In holding that the corpus of the trust constituted property with respect to which the decedent made a transfer intended to take effect in possession or enjoyment at or after her death, and should therefore be included in the gross estate of the decedent, under the provisions of the Revenue Act of 1918.

3. In holding that if the Revenue Act of 1918, according to a correct construction, purports to authorize the tax herein imposed, it is constitutional.

Summary of Argument.

The property forming the corpus of the trust in this case is not property transferred, or with respect to which a trust was created, in contemplation of or intended to take effect in possession or enjoyment at or after the grantor's death, within the meaning of section 402 (c) of the Revenue Act of 1918.

If the said act, properly construed, would require the inclusion of the corpus of said trust in the gross estate of the grantor, it is unconstitutional.

Argument.

I.

THE TRANSFER IN THIS CASE WAS EFFECTIVE TO PASS THE TITLE TO THE PROPERTY AND THE ECONOMIC BENEFITS TO BE DERIVED THEREFROM IMMEDIATELY WHEN IT WAS MADE, ON OCTOBER 1ST, 1917.

There was no power reserved to revoke the transfer or trust. The economic interest was divided, of course. During the lifetime of the husband of the settlor, the income was payable to him. If he died before she did, the income went to her, during her lifetime. The remainder was transferred absolutely to the children.

The language of the statute is as follows:

> "Sec. 402. That the value of the gross estate of the decedent shall be determined by including the value at the time of his death of all property. * * * (c) to the extent of any interest therein of which the decedent has at any time made a transfer, or with respect to which he has at any time created a trust, in contemplation of or intended to take effect in possession or enjoyment at or after his death (whether such transfer or trust is made or created before or after the passage of this Act) * * *."
>
> *Revenue Act of 1918* (February 24, 1919, 40 Stat. at L. 1096, 1097, Chap. 18).

The only interest which decedent had in the property at the time of her death was her contingent life estate. Everything else she had effectually transferred. She could not, if she changed her mind, retake what she had given to her husband, a life estate in the

income, and what she had given to her children, the remainder after the death of her husband and herself.

> "What this law taxes is not the interest to which the legatees and devisees succeed on death, but the interest which ceased by reason of the death."
>
> *Y. M. C. A. v. Davis*, 264 U. S. 47, at p. 50.

The interest which ceased by reason of Mrs. May's death was her contingent interest.

If neither the value of the life estates, nor that of the remainders, were required to be included in the gross estate in the Reinecke case (278 U. S. 339), notwithstanding the fact that the remainders were intended to take effect in possession or enjoyment at or after settlor's death, the value of the life estate given here to Barney May, settlor's husband, and the value of the remainder given to her children, should not be included in the gross estate. The circumstance that in this case there was the possibility of a life estate in favor of settlor intervening does not detract from the finality and irrevocability of the estates given to others. In the Reinecke case, the economic benefit was divided into two parts or interests. Here it *might* have been divided into three parts or interests, and only one of these interests could cease on Mrs. May's death.

The government erroneously contended in the Reinecke case, as to the five trusts, that even without the reserved powers to manage and modify the trusts, the transfers of the *remainder* interests were all subject to the tax because, within the language of sec. 402, they were intended to take effect in possession or enjoyment at or after his death.

In denying this contention, the Court said (pp. 347, 347):

> "One may freely give his property to another by absolute gift without subjecting himself or his estate to a tax, but we are asked to say that this statute means that he may not make a gift *inter vivos*, equally absolute and complete, without subjecting it to a tax, if the gift takes the form of a life estate in one, with remainder over to another, at or after the donor's death. It would require plain and compelling language to justify so incongruous a result, and we think it is wanting in the present statute."

In principle, there is no difference between the gift of a life estate to A, with remainder to B, and a gift of a life estate to A, a life estate to Z, if the latter survives A, and the remainder to B.

All that can be taxed is the value of that which the settlor did not give away, but which he retained for himself, and which passed from him to some one else upon his death. The language of this statute leans more in the direction of such a conclusion than it does to the contention of the government. But if there is any doubt about it, the doubt should be resolved in the taxpayer's favor: *Gould v. Gould*, 245 U. S. 151.

This Court has not decided, so far as we have been able to discover, the precise question whether a reservation by the settlor of the possession and enjoyment of the income during his life in a trust or transfer created after the passage of the estate tax of 1916 authorizes the imposition of a tax on the corpus of the trust. As we read those opinions of this Court which may be said to shed a light on the question, we find

that they lay down the principle that a tax attaches only in those cases where there is a shifting of the economic use and benefit of property upon the death of settlor, and that *the tax is measured by the value of the economic benefits which pass from the settlor to his successor by the settlor's death.*

There is nothing in the cases of *Chase National Bank v. U. S.*, 278 U. S. 327, or in the Reinecke case, against our position.

In the first case, the insured had full power at all times during his lifetime to dispose of the entire economic benefits or enjoyment in the life insurance policies.

In the Reinecke case, as to the two trusts, the corpus of which this Court held was taxable, the settlor reserved the right to revoke them, and upon the exercise of this right, the trustee was required to return the corpus of the trust to him. He was, therefore, during his lifetime, in the same position as if he were making gifts from time to time of the income, and without obligation to continue them. As we understand the opinion, whatever a person gives away, not in contemplation of death, is free from taxation. But it must be a real gift, without strings attached to it. The extent of the gift, the share of the economic benefit or interest given, is immaterial, providing it is a gift, an irrevocable gift, from the moment of its making.

In *Carnill v. McCaughn*, 30 F. (2d) 696, the facts as stated by the Court in its opinion (p. 697) were that the decedent made a transfer of property to a trustee, reserving to himself the income from the property during his life, the remainder going at his death to named beneficiaries. The interests of the latter were vested

and absolute, and there was no power of revocation or control over the gift retained by the donor. The Court held that there is to be excluded from the taxation:

> "transfers by way of gift *of the remainder* after a life estate reserved, when the gift is not in contemplation of death, is absolute, and the decedent up to the time of his death had no power of control over it, or to direct the course of distribution of the property by his action or non-action." (Italics ours). (p. 699).

In the case of *Nichols v. Bradley*, 27 F. (2d) 47, the Circuit Court affirmed the judgment of the District Court in holding the corpus of a trust not taxable under the Revenue Act of 1918. The trust provided that the income was to be paid to the daughters of the grantor and their issue; if the grantor did not survive the daughters and their issue, the trust was to be continued until 20 years after the death of the last surviving daughter, when the corpus was to be distributed among the issue of the daughters. In case of the death of all three daughters without issue, during the lifetime of the grantor, all of the income was to be paid to her, during her lifetime.

The Court said (page 48):

> "It is the contention of the government, that Mrs. Bradley, upon the making of the declaration of trust, did not part with the possession or enjoyment of this one-half interest in the property contributed by her, and of which the daughters and their issue were to have the income; that she retained a reversionary interest, that was not to pass until her death, and that in fact did not pass until her death. But we think that, upon making

the trust deed, Mrs. Bradley parted with the possession and enjoyment of this half of the property contributed by her to the trust, and that she was to have no reversionary interest in this half unless the daughters and their issue failed to survive her, or (what is the same thing) unless she survived the daughters and their issue, which she did not do. Having died first, no reversionary interest ever arose in her favor. Her death did not pass the right to the possession and enjoyment of the half of the property and income here in question from her to the daughters and their issue. That right passed to them at once by the declaration of trust, subject to defeasance in case they failed to survive Mrs. Bradley. Her death, however, before that of her daughters, foreclosed the possibility of a reversionary interest arising in her favor. In other words, her death did not affect the transfer of the possession and enjoyment of the property and income to the daughters from and after that time, but, having occurred during the lifetime of the daughters, it foreclosed the possibility of her acquiring a reversionary interest in this half of the property."

From the opinion of the District Court, in the same case, *Bradley v. Nichols,* 13 F. (2d) 857, at page 858:

"The present case goes much beyond *Coolidge v. Nichols,* (D. C.) 4 F. (2d) 112, and *Safe Deposit Co. v. Tait,* (D. C.) 295 F. 429, which dealt with trusts in which the donors reserved life estates, and in which it was held that the transaction considered as a whole amounted to a transfer of the property to take effect on the donor's death. *Shukert v. Allen, Collector,* 6 F. (2d) 551 (C. C. A.

8th), supports the government's contention that the language of the statute refers to the time when the final possible *cestui* will get the benefit of the trust. On the other hand, in *Dexter v. Treasurer and Receiver General,* 243 Mass. 523, 137 N. E. 877, the Supreme Judicial Court of Massachusetts, construing a state statute, the language of which upon this point is practically identical with that of the federal statute under discussion, reached a very different conclusion, and held that what was meant by 'taking effect in possession or enjoyment' was the definite determination of interests, whether legal or equitable, and that, if such interests are established during the donor's life, and are in no way contingent upon his death, 'the beneficial interest in the enjoyment of the proceeds of the trust passed at the time of its execution. * * * The possession and enjoyment vested in the beneficiaries when the trust deed was delivered to the trustees. The deed passed the property from the donor, and gave to the beneficiaries at that time the beneficial interest in it, and their enjoyment and possession of it was not contingent on the death of the donor.' Carroll, J., 243 Mass. 526, 137 N. E. 879. This seems to me a more reasonable view of the language and scope of such a statute as I am dealing with than that taken in *Shukert v. Allen, supra.*"

In the case of *Amalie Hirsh et al., executors,* of *Morris M. Hirsh v. the United States,* decided by the Court of Claims on December 2, 1929, No. E-284, the decedent, on November 1, 1919, transferred to each of four of his children securities to the value of $50,000.00 under the terms of agreements entered into with them, separately, in which the child agreed to pay to the

wife of the grantor the sum of $2,000 per annum during her life, and thereafter to the grantor during his life. The Court held that the property transferred was not to be included in the gross estate of the decedent, under sec. 402 (c) of the Revenue Act of 1918.

The government argued below that it must be assumed from the record that Pauline May survived her husband because the Commissioner failed to deduct the value of Barney May's life estate, and cited *United States v. Rindskopf,* 105 U. S. 418. The government, in all fairness, should not attempt by casuistry to establish that to be a fact which it knows is not a fact, in order to gain some advantage over the taxpayer. It has available its own records in the matter of the estate tax of Barney May, which show that Barney May survived his wife. Besides, there is a letter of the Treasury Department attached to the amended statement of claim, record, page 18, which is addressed to Barney May, et al., Executors, Estate of Pauline May. This shows that the estate tax return in the Pauline May Estate was made by Barney May, and the others, as executors. The will shows that the Barney May who was named as an executor was decedent's husband, and we all know that letters testamentary are not granted to a dead person. The estate tax return referred to in the statement of claim, paragraph 3, record, page 3, shows that Barney May was living and making the return. In order not to encumber the record, we did not attach to the statement of claim a copy of the entire return, but attached only the schedules that were relevant and material to the issue. The case of *U. S. v. Rindskopf,* 105 U. S. 418, cited by the government, cannot be tortured into an authority for the false assumption that Barney May died before his wife, in view of the circumstances above set forth.

II.

IF THE REVENUE ACT OF 1918, ACCORDING TO A CORRECT CONSTRUCTION, PURPORTS TO AUTHORIZE THE TAX HERE IMPOSED, IT IS UNCONSTITUTIONAL.

In *Nichols v. Coolidge*, 274 U. S. 531, at pages 542 and 543, this Court said:

> "We must conclude that Sec. 402 (c) of the statute here under consideration, in so far as it requires that there shall be included in the gross estate the value of property transferred by a decedent prior to its passage merely because the conveyance was intended to take effect in possession or enjoyment at or after his death, is arbitrary, capricious and amounts to confiscation. Whether or how far the challenged provision is valid in respect of transfers made subsequent to the enactment, we need not now consider."

The defendant's contention that notwithstanding the above, if a transfer was made after the Act of Sept. 8, 1916 (39 Stat. 756), the prior estate tax law, the corpus of such a trust must be included in the gross estate, notwithstanding that the transfer was made after the passage of the Revenue Act of 1918, under which it is sought to tax the corpus, has been rejected in the following cases:

Dugan, Executor, v. Commissioner, 8 B. T. A. 482;

Alsop, Executor, v. Commissioner, 7 B. T. A 848;

Northwestern Trust Co., Executor, v. Commissioner, 9 B. T. A. 96.

In the Dugan case, (*supra*), on December 31, 1919, the decedent and her two brothers and her sister, each

owning one-fourth of the common stock of a coal mining company, transferred their respective shares of stock to trustees to hold under a declaration of trust, whereby the trustees were to pay the income to the creators of the trust, with rights over to the survivors upon the death of any beneficiary. The decedent died on May 18, 1923. The Board held that the transfer there involved is of the character of that referred to by this Court in Nichols v. Coolidge (*supra*), and that the value of the interest of the decedent in the trust estate should not be included in the gross estate for the purpose of estate tax.

In the Alsop case (*supra*), the decedent, in 1917, created a trust, the income of which, except a small part which was reserved to himself, was payable to a divorced wife, the corpus, at the death of the latter, to be paid to the grantor for life; otherwise to his sons. Held that since the trust was created prior to the enactment of the Revenue Act of 1921, the corpus is not subject to the estate tax.

In the Northern Trust Company case (*supra*), the decedent made, in 1917, a deed of trust of certain real estate, under which the entire net income was to be paid to the grantor for life, and after her death it was to be distributed among her children. In 1919, she made another deed of trust, transferring shares of stock, and provided that during the lifetime of the grantor, the entire net income should be accumulated and added to the principal, and form a permanent portion of such principal, provided that such accumulations should not continue for more than 21 years, and in case the grantor should still be living at the end of 21 years, then thereafter the income should be distributed in the same way that it would be distributed

in case she were not living; and that after the death of the grantor the entire net income from the trust estate should be paid over and distributed to her children. In 1921, she made another deed of trust conveying certain real estate for the uses and purposes set forth in the deed of trust of 1919. It was held that the property transferred by these trusts should be excluded from the gross estate.

The Revenue Act of 1916 has been repealed. To all intents and purposes it is the same as though that statute had never existed. The government cannot avail itself of that act for any purpose save that specified in the statute which repealed it, the Revenue Act of 1918, viz: "the assessment and collection of all estate taxes, and the imposition and collection of all penalties and forfeitures, which have accrued" under the Act of 1916, and, manifestly, no tax accrued against this estate under that act.

The cases of *Bear Lake etc Co. v. Garland,* 164 U. S. 1; *Lamb v. Powder etc. Co.,* 132 Fed. 434, and *Great Northern Ry. Co. v. U. S.,* 155 Fed. 945, cited by the government below on this proposition, presented entirely different situations, and have no bearing on this case.

The government stated in the court below that it did not contend that the transfer in this case was made in contemplation of death. The making of trusts was a common occurrence years before there were any estate taxes. They had a legitimate purpose, quite aside from a desire to avoid estate taxes. There can be no presumption that an improper or unethical motive was at the bottom of this trust.

The language of this Court in the case of Nichols v. Coolidge (*supra*) applies with equal force to the case at bar.

CONCLUSION.

The judgment of the Circuit Court of Appeals should be reversed.

CHAS. H. SACHS,

LOUIS CAPLAN,

Attorneys for Petitioners.

December, 1929.

SEP 7
CHARLES ELMO

FILE COPY

No. 311

In the Supreme Court of the United States

OCTOBER TERM, 1929

WALTER A. MAY, HERBERT L. MAY, EDWIN C. MAY, ET AL., EXECUTORS OF THE LAST WILL AND TESTAMENT OF PAULINE MAY, DECEASED, PETITIONERS

v.

D. B. HEINER, COLLECTOR OF INTERNAL REVENUE FOR THE 23RD DISTRICT OF PENNSYLVANIA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT

MEMORANDUM FOR THE RESPONDENT

In the Supreme Court of the United States

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MEMORANDUM FOR THE RESPONDENT

The respondent does not oppose the petition.

The question presented is whether, under Section 402(c) of the Revenue Act of 1918, there should be included in the gross estate of a decedent for purposes of the estate tax the corpus of a trust which was created by the decedent in 1917, under which the income was payable to decedent's husband during his lifetime and after his death to the decedent during her lifetime, the corpus of the trust being distributable to remaindermen upon her death.

The District Court answered this question in the affirmative in an opinion reported in 25 F. (2d) 1004. (R. 32–38.) Its judgment was affirmed by the Circuit Court of Appeals in an opinion of three lines, reported in 32 F. (2d) 1017. (R. 41.) Thereafter a petition for rehearing, filed after this Court handed down its opinion in *Reinecke* v. *Northern Trust Co.*, 278 U. S. 339, and based upon that opinion, was denied. (R. 45–57.)

The decision of the Circuit Court of Appeals in the instant case, in holding that such a trust should be included in computing decedent's gross estate, is in conflict with that of the First Circuit in *Nichols* v. *Bradley*, 27 F. (2d) 47; and the same question is raised by a number of other cases now pending before the Circuit Courts of Appeals and the Board of Tax Appeals.

Because of these facts and because of the great practical importance of the question and the benefits that would flow from an early determination thereof, we do not oppose the petition for certiorari.

Respectfully submitted.

CHARLES E. HUGHES, Jr.,
Solicitor General.

SEWALL KEY,
Special Assistant to the Attorney General.

SEPTEMBER, 1929.

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ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE RESPONDENT

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ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE RESPONDENT

OPINIONS BELOW

The opinion of the District Court (R. 32) is reported in 25 F. (2d) 1004. In a per curiam opinion (R. 41), the Circuit Court of Appeals affirmed the judgment on the opinion of the District Court.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered on January 9, 1929. (R. 41–42.) Petition for a rehearing was denied June 24, 1929.

(R. 42.) Petition for writ of certiorari was filed August 8, 1929, and was granted October 21, 1929. (R. 43.) The jurisdiction of this Court rests on Section 240 (*a*) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTION PRESENTED

The question is whether under Section 402 (*c*) of the Revenue Act of 1918 there should be included in the gross estate of a decedent for purposes of estate tax the corpus of a trust created by the decedent in 1917 under which the income was payable to decedent's husband during his lifetime and after his death to the decedent during her lifetime, and after her death the corpus of the trust was to be distributable to remaindermen.

Petitioners have raised the further question whether such a tax may be retroactively imposed, but under respondent's theory no such question arises.

STATUTE INVOLVED

The Revenue Act of 1918, c. 18, 40 Stat. 1057, 1097, provides as follows:

> SEC. 402. That the value of the gross estate of the decedent shall be determined by including the value at the time of his death of all property, real or personal, tangible or intangible, wherever situated—
>
> * * * * * *
>
> (c) To the extent of any interest therein of which the decedent has at any time made a transfer, or with respect to which he has

at any time created a trust, in contemplation of or intended to take effect in possession or enjoyment at or after his death (whether such transfer or trust is made or created before or after the passage of this Act), except in case of a bona fide sale for a fair consideration in money or money's worth. * * *

STATEMENT

Pauline May died March 25, 1920, in the State of Pennsylvania. (R. 3.) On May 15, 1917, she signed a written statement in which she declared an intention to set up a trust in favor of her husband, herself, and children. (R. 12.) On October 1, 1917, she executed a formal trust agreement, by which a trust estate was established. It was provided that the income from the estate should be paid to her husband, Barney May, during his lifetime, and after his death to the settlor during her lifetime; and after her death the corpus was to be distributed equally among four children. (R. 13–14.) It does not appear in the record whether Pauline May predeceased her husband or not (pp. 2, 4, 7, 14).

The petitioners made a return for the Federal estate tax in which they did not include the value of the securities in the trust estate. (R. 6.) The Commissioner of Internal Revenue added to the gross estate the value of these securities, and by reason thereof assessed and collected the additional tax here in dispute. The tax was paid under protest, and a claim for refund thereafter made was

rejected by the Commissioner. (R. 7–8.) Thereupon this suit was brought. The trial court gave judgment to the respondent on a motion to strike. (R. 31, 38.) The judgment was affirmed by the Circuit Court of Appeals. The petition for certiorari was not opposed.

SUMMARY OF ARGUMENT

The statute reaches all transfers of a testamentary character. It is established that a taxable transfer results from the termination by death of any of the legal incidents of property through which its use or economic enjoyment may be controlled. Where a trust is created under which the settlor reserves the income or use of the property during life and upon his death the corpus is distributed to designated beneficiaries, it has been held in both Federal and State courts that a taxable transfer occurs at the time of the settlor's death. Even though the life interest in the income from a trust is contingent, there is created thereby a legal incident of property which deprives the ultimate beneficiaries of the use or enjoyment of the property until after the death of the person having the right. It is submitted that the termination of such a right results in a shifting of the economic benefits of the property, whether the life interest was actually enjoyed or not.

The record fails to show whether Pauline May had a present right to enjoyment of the income or only a contingent right. Because of the rule that

the taxpayer must show all the facts essential to enable him to recover, and the rule that the Commissioner's assessment is *prima facie* correct, the judgment should be affirmed if sustainable on either theory of the case. The tax was properly reckoned upon the value of the corpus of the trust.

The tax is not imposed upon the incomplete transfer in 1917 which created the trust, but upon the transfer at the maker's death in 1920 of the use and enjoyment which she retained during her life time. Thus the imposition of the tax under the Revenue Act of 1918 involves no question of retroactivity. Moreover, the Act of 1918 as applied to this trust created in 1917 may not be regarded as arbitrarily imposing an unexpected liability since an identical tax was then provided by the Act of 1916.

ARGUMENT

I

CONGRESS HAS POWER, UNDER THE CONSTITUTION, TO IMPOSE, AND BY THE ACT OF 1918 HAS IMPOSED, AN ESTATE TAX MEASURED BY THE VALUE OF PROPERTY IRREVOCABLY TRANSFERRED BY A DECEDENT IN HER LIFETIME, BUT SUBJECT TO A RESERVATION TO THE DECEDENT OF A LIFE ESTATE THEREIN

Section 402 (c) of the Revenue Act of 1918, c. 18, 40 Stat. 1057, includes in the gross estate of every decedent "any interest * * * with respect to which he has at any time created a trust * * * intended to take effect in possession or enjoyment at or after his death." With respect to this statute

it has been said in the case *Y. M. C. A.* v. *Davis*, 264 U. S. 47, 50:

> What was being imposed here was an excise upon the transfer of an estate upon death of the owner.

The opinion of this Court in *Chase National Bank* v. *United States*, 278 U. S. 327, indicates that a taxable transfer results from the termination by death of *any* of the legal incidents of property through which its use or economic enjoyment may be controlled. It was then said (pp. 334–335):

> The precise question presented is whether the termination at death of that power and the consequent passing to the designated beneficiaries of all rights under the policies freed of the possibility of its exercise may be the legitimate subject of a transfer tax, *as is true of the termination by death of any of the other legal incidents of property through which its use or economic enjoyment may be controlled.* (Italics ours.)

In that case the power to change the beneficiary was reserved by the decedent in insurance policies on his life in favor of his wife. It was decided that the power was a limitation of the gift which made it incomplete as to the donor as well as to the donee and that the termination of such power by death brings about "the completion of that shifting of the economic benefits of property which is the real subject of the tax." To the objection that the beneficiaries' interests in the policies were transferred to them from the insurer rather than from the de-

cedent, this Court answered that the word "transfer" in the statute is not to be taken in any restricted sense and that the power to tax the privilege of transfer at death can not be controlled by the mere choice of the formalities which may attend the donor's bestowal of benefits on another at death, but that the termination of the power at death operated as an effective transfer which was subject to tax.

If we disregard, in the trust under consideration, the provision in favor of decedent's husband, Barney May, we have the very common case of an absolute transfer of property containing a reservation to the transferor of the life use thereof. Under this point we shall consider the trust on this basis. Under the next we shall take up the question whether the provision in favor of Barney May changes the character of the transfer so as to affect the application of the taxing statute.

The general characteristics of a testamentary disposition, putting aside matters of form, are that the property go over at the death of the testator, and that during his lifetime he have the possession, enjoyment, or control. It has been frequently held that a trust under which the settlor receives the income of property during life, and upon his death the corpus is distributed to designated beneficiaries, involves a transfer to such beneficiaries intended to take effect in possession or enjoyment at or after the settlor's death, and is subject to an inheritance tax. The fact that the corpus of the

trust estate is irrevocably vested at the time the trust is created is held to be immaterial, as neither possession nor enjoyment within the meaning of the law takes effect until the death of the settlor (*McCaughn* v. *Girard Trust Co.* (C. C. A. 3rd), 11 F. (2d) 520; *Reed* v. *Howbert* (Colo), 8 F. (2d) 641; *Una Libby Kaufman*, 5 B. T. A. 31; *Matter of Green*, 153 N. Y. 223; *Crocker* v. *Shaw*, 174 Mass. 266; *Carter* v. *Bugbee*, 91 N. J. L. 438; *Todd's Estate* (No. 2), 237 Pa. 466.) See also *Tips* v. *Bass* (W. D. Tex.), 21 F. (2d) 460. This principle is recognized generally. (See Gleason & Otis' Inheritance Taxation, 2d ed., p. 125 et seq.)

Carnill v. *McCaughn* (E. D. Pa.), 30 F. (2d) 696, is to the contrary. (*Cf.* also *Frew* v. *Bowers* (C. C. A. 2d), 12 F. (2d) 625; *Boyd* v. *United States* (D. Conn.), 34 F. (2d) 488.) *Carnill* v. *McCaughn* is now pending in the Circuit Court of Appeals for the Third Circuit. In deciding it the District Court held that the decisions of this Court in *Nichols* v. *Coolidge*, 274 U. S. 531; *Reinecke* v. *Northern Trust Co.*, 278 U. S. 339; and *Chase National Bank* v. *United States, supra*, have modified the doctrine relied upon by the Circuit Court of Appeals for the Third Circuit in the instant case and in *McCaughn* v. *Girard Trust Co., supra*. The above-mentioned decisions of this Court were expressly brought to the attention of the court below in the instant case, which affirmed the judgment of the District Court in favor of the Government in a *per curiam* opinion (R. 41), in which it was said that this case is dis-

tinguished from *Nichols* v. *Coolidge, supra,* on the facts. A petition for rehearing was thereafter denied. (R. 42.) We submit that *Reinecke* v. *Northern Trust Co.* and *Chase National Bank* v. *United States, supra,* do not warrant the interpretation given them in *Carnill* v. *McCaughn, supra.* The learned District Judge was evidently of the same opinion that he had expressed earlier in *Girard Trust Co.* v. *McCaughn,* 3 F. (2d) 618, where he held in substance that although the income was reserved by the settlor the interest which the remainderman had was nevertheless vested in possession and enjoyment before the death of the settlor. Upon review that case was reversed. *McCaughn* v. *Girard Trust Co., supra.* This Court in *Chase National Bank* v. *United States, supra,* rejected a similar theory in the following language (p. 334):

> It is true, as emphasized by plaintiffs, that the interest of the beneficiaries in the insurance policies effected by decedent "vested" in them before his death and that the proceeds of the policies came to the beneficiaries not directly from the decedent but from the insurer. But until the moment of death the decedent retained a legal interest in the policies which gave him the power of disposition of them and their proceeds as completely as if he were himself the beneficiary of them.

In *Reinecke* v. *Northern Trust Co., supra,* the two revocable trusts, which were held by this Court to be subject to inclusion in the value of the decedent's gross estate, contained a reservation of

income to the settlor for life, but the effect of such a reservation was not passed upon by this Court or by the Circuit Court of Appeals for the Seventh Circuit. (See 24 F. (2d) 91.) In the five trusts which were there held to be beyond the reach of the statute the settlor had reserved none of the income for himself, and the transfers of the remainder interests at his death did not then pass from his own possession, enjoyment, or control. This Court said (p. 348):

> * * * we think it at least doubtful whether the trusts or interests in a trust intended to be reached by the phrase in section 402 (c) "to take effect in possession or enjoyment at or after his death," include any others than those passing from the possession, enjoyment or control of the donor at his death and so taxable as transfers at death under section 401.

The plain import of this language is that the statute does include all transfers which pass directly from the possession, enjoyment, or control of the decedent.

The right to enjoy the income is what gives property value, and the reservation of that right is equivalent to the continued ownership of the property. With reference to a settlor who conveyed personal property in trust, the income to be paid to him during his life, it was said in *Reed* v. *Howbert*, *supra* (p. 644):

> He continued to enjoy the income as before the transfer. He had a right of action

against the trustee for waste, and could assign or transfer his life interest, in whole or in part, as he might see fit. His income therefrom was not fixed, but still subject to any fluctuations in the dividends or interest earned by the securities the same as before the conveyance.

We think the better view is that the cessation by death of such a present right to receive income constitutes a taxable transfer.

II

THE IMPOSITION OF THE TAX UNDER CONSIDERATION IS NOT AFFECTED BY THE FACT THAT THE PROPERTY TRANSFERRED WAS SUBJECTED BY THE TRANSFEROR TO A FURTHER RESERVATION OF A LIFE ESTATE THEREIN IN FAVOR OF HER HUSBAND

In May, 1917, the decedent declared her intention to establish a trust requiring the trustees "to pay to B. May the net income for life, and after his death to Pauline May for life, if she survive him; and *after the death of both of them* the said property is to be divided equally among her sons and daughter." (R. 12.) (Italics ours.) In the trust agreement executed on October 1, 1917, it was provided that the trustees should pay the net income "to Barney May during his lifetime, and after his decease to Pauline May during her lifetime, and *after her decease* all the property in said trust" was to be distributed among their children. (R. 14.) (Italics ours.)

The language of the trust agreement is perhaps susceptible of the construction that the reservation of income should terminate and the corpus be distributed to the children immediately upon the settlor's death, whether the husband survived her or not. In that case the children would enter into complete possession and enjoyment when the settlor died. If the husband's life interest continued beyond her death, the reservation would continue during his lifetime. But in either case her death would relieve the trust from the burden of her reserved life interest; and in either case the trust was intended to and did as to the children "take effect in possession or enjoyment at or after" her death.

Assuming but not conceding that under the trust agreement the right of the husband to the income would continue after the settlor's death in the event he survived her, we proceed to deal with the suggestion that the interposition of an additional life interest in favor of the husband alters the legal situation.

Petitioners state in their brief that decedent's husband survived her. This does not appear in the record, which consists of an amended statement of claim with exhibits and a motion to strike. (R. 2–31.) It is settled that in an action like this the taxpayer carries the burden of establishing all facts necessary to a recovery. *Botany Mills* v. *United States,* 278 U. S. 282; *United States* v. *Anderson,*

269 U. S. 422; *United States* v. *Mitchell*, 271 U. S. 9; *Reinecke* v. *Spalding*, No. 59, October Term, 1929, decided January 6, 1930. It is also settled that an assessment made by the Commissioner is *prima facie* correct. *United States* v. *Rindskopf*, 105 U. S. 418, 422; *Wickwire* v. *Reinecke*, 275 U. S. 101, 105.

In any event, we contend that the termination by death of a contingent life estate will support the tax, which is one imposed upon "an interest which closed by reason of death." *Y. M. C. A.* v. *Davis*, 264 U. S. 47; *Edwards* v. *Slocum*, 264 U. S. 1. The right of the decedent to receive the income of this trust for life in the event she survives her husband is a right which may postpone the enjoyment by the remaindermen of the economic benefits of the property transferred. The termination of this right by the death of the decedent, freeing the remainder of the possibility of its exercise, is a transfer within the meaning of the statute, properly measured by the value of the property thus relieved of the burden.

The statute imposes a tax on transfers by descent or by will which take effect at the death of the testator and also a tax upon transfers made in contemplation of death, although nothing actually passes at death. It was but logical to tax transfers partaking of the characteristics of both these classes, intended to take effect at or after death of the transferor, though death was not actually im-

pending. (Cf. *Keeney* v. *New York*, 222 U. S. 525, 536.)

The right of the decedent to receive the income in the event that she survived her husband, like the right of the insured in *Chase National Bank* v. *United States, supra,* to change the beneficiary, is a legal incident of property which deprives ultimate beneficiaries of the enjoyment of their estates until after her death.

The failure to exercise the right made no difference in the *Chase National Bank case,* it being there said (p. 338):

> And the non-exercise of the power may be as much a disposition of property testamentary in nature as would be its exercise at death, * * *.

It follows that the termination by death of the mere existence of an outstanding right of enjoyment operates as an effective transfer, and we submit that the death of Pauline May terminated such a right. Had she relinquished even a contingent right to the income before death there would surely have been a shifting of the economic benefits of the property, inuring to those who owned the property subject to that right. The termination of that right at or after death has the same effect.

A situation similar to the instant case existed in *Curley* v. *Tait,* 276 Fed. 840. In that case there were four gifts, some to the Johns Hopkins Hospital, others to the Johns Hopkins University. In each of three agreements of transfer the trans-

feree agreed to pay the net income to Grafflin, the transferor, during his lifetime and after his death to his wife. In the fourth agreement the hospital covenanted to pay the net income to the wife during her life and afterwards to Grafflin if he survived her. Upon Grafflin's death before his wife the Government contended that the value of all these gifts should be included in his estate. The court decided that the hospital was not to enjoy the property comprised in the fourth agreement until after the death of Grafflin but held further that the entire interest was not taxable, reserving the question of whether the Government was entitled to any part of the tax less than the whole. No further report of the case appears, but the language of the court with respect to the postponement of enjoyment by the ultimate beneficiaries is pertinent here. The court said (p. 841):

> To the man in the street, the enjoyment of a share of stock would be found in the right to apply to his own uses the dividends that might be declared upon it, and from this standpoint there is so much force in the government's contention that neither Hospital nor University enjoyed their gifts during Grafflin's lifetime, that without further discussion it may, for the purpose of this case, be assumed to be sound, although it will be unnecessary so to decide.

Hirsh v. *United States* (Ct. Cls.), 35 F. (2d) 982, is distinguishable on the facts. In that case

there was an outright transfer of securities to the decedent's children, who agreed to pay a life annuity in a specified sum to his wife and to the decedent for his life in case he survived her. It was held that no trust was created by the agreements; that the securities were not charged with the annuity; that the transferees entered into the possession and enjoyment of the securities; that no restriction was placed upon their sale or disposal; that each child was personally obligated to pay a specific annuity, regardless of whether any return was received on the securities; and that each was financially able to pay the annuity. The case turned on the construction of the agreements and involved no departure in principle from the instant case.

The fact that the intervening life estate might extend beyond the date of the settlor's death does not alter the situation. Since the enjoyment of the economic benefits from the property did not take effect in the remaindermen prior to the settlor's death, it does not matter that it was or might have been postponed to a time subsequent to her death. The language of the statute includes just such a situation. The grant of the life estate to the husband did not depend upon the continuance or the cessation of the life of the settlor and did not constitute a taxable transfer. So far as the effect of the transfer to the remaindermen is concerned, it is immaterial whether the settlor retained the income to herself or directed its payment to some

third person, for the tax is imposed on the interest that ceased upon her death.

We submit that upon the death of Mrs. May there occurred a taxable transfer within the meaning of the statute as interpreted by this Court in the cases heretofore discussed. This transfer comprised the right to receive the income which is "that which gives value to property." *Pollock* v. *Farmers' Loan & Trust Co.*, 158 U. S. 601, 628. Accordingly, the tax was properly reckoned upon the value of the corpus of the trust relieved of the burden of the settlor's life estate, just as the tax in *Reinecke* v. *Northern Trust Co., supra*, was held to be rightly imposed on the transfers of the corpus of the two trusts.

III

THE TAXABLE TRANSFER WAS COMPLETED UPON THE SETTLOR'S DEATH IN 1920 AND THE IMPOSITION OF THE TAX BY THE REVENUE ACT OF 1918 INVOLVES NO QUESTION OF RETROACTIVITY

The trust here involved was established October 1, 1917, subsequent to the passage of the Revenue Act of 1916 and prior to the enactment of the Revenue Act of 1918. The settlor died on March 25, 1920, which was within the taxing period covered by the Revenue Act of 1918, under which the tax in dispute was assessed and collected. The Revenue Act of 1916 imposed a similar tax and accordingly it can not be said in this case that the settlor established the trust with no knowledge of the tax.

Thus the Revenue Act of 1918 did not impose "an unexpected liability that if known might have induced those concerned to avoid it and to use their money in other ways." *Llewellyn* v. *Frick,* 268 U. S. 238, 252. We therefore submit that in imposing a death duty upon a transaction which was in its nature testamentary and in which the settlor retained an interest up to the time of her death there is nothing arbitrary, capricious, or burdensome.

We have heretofore contended that the settlor had reserved an interest in the trust property which deprived the ultimate beneficiaries of the enjoyment of their estates until after her death, and that this Court has already held that the termination of such an interest by death brings about "the completion of that shifting of the economic benefits of property which is the real subject of the tax." *Chase National Bank* v. *United States, supra* (p. 338).

In this case the transfer of 1917 was not completed until the transfer of the decedent's interest in the trust, which occurred at her death in 1920. The interest which was transferred upon the death of Pauline May passed directly from her possession, enjoyment, or control and hence it was properly included in the gross estate. Since the taxable transfer was completed March 25, 1920, subsequent to the effective date of the taxing statute, there can be no question of retroactivity.

It can make no difference that the trust agreement was made prior to the time of the enactment of the taxing statute, because the tax has not been imposed upon that incomplete transfer. The tax is an excise on the exercise of the privilege of transferring the property of a decedent at death. *Chase National Bank* v. *United States, supra.* It is the exercise of the privilege *during the taxing period* which is the subject upon which the statute places the excise duty. Cf. *Billings* v. *United States,* 232 U. S. 261, 280. The statute involved in that case was passed near the close of the taxing period, which was the only occasion for the discussion of retroactivity. As in that case, the tax here is valid because there was an exercise of the privilege within the taxing period.

This case is not like *Nichols* v. *Coolidge,* 274 U. S. 531, where Section 402 of the Revenue Act of 1918 was held to be invalid in so far as it required that there should be included in the gross estate the value of property transferred by a decedent prior to its passage. In that case the settlors during their lifetime assigned to the beneficiaries their entire interests in the property, especially any right to the income therefrom. No interest whatever was retained by the settlors, so that nothing passed at death, and the only possible occasion for the tax was the transfer to the trustees many years prior to the statute. The decision turned on the point that (p. 540) "the conveyance by Mrs. Coolidge to

trustees was in no proper sense testamentary, and it bears no substantial relationship to the transfer by death." In this case the completion of the transfer at death gave it the testamentary character which was lacking in the *Coolidge case*.

The occasion for the tax here was the exercise during the taxing period of the privilege of transfer at or after death. Death and the resulting transfer occurred within the taxing period, and the establishment of the testamentary character of the transfer within the taxing period disposes of any question of the validity of the tax.

CONCLUSION

In view of the foregoing, it is submitted that the judgment of the court below should be affirmed.

Respectfully submitted,

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1929.

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vs.

D. B. HEINER, COLLECTOR OF INTERNAL REVENUE.

BRIEF OF ARTHUR W. MACHEN, JR., Attorney for SAFE DEPOSIT AND TRUST COMPANY OF BALTIMORE, Amicus Curiae.

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IN THE

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OCTOBER TERM, 1929.

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WALTER A. MAY, ET AL., EXECUTORS OF PAULINE MAY,

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D. B. HEINER, COLLECTOR OF INTERNAL REVENUE.

BRIEF OF ARTHUR W. MACHEN, JR., Attorney for SAFE DEPOSIT AND TRUST COMPANY OF BALTIMORE, Amicus Curiae.

Statement of Facts.

The case made by the "Statement of Claim" (R. 2-9) and the exhibits therewith filed (R. 9-31) is briefly as follows:

Pauline May, on May 15, 1917, executed an agreement under seal to transfer certain property to trustees upon trusts therein outlined, and covenanted to execute a more formal instrument of trust (R. 12).

On October 1, 1917, she executed a formal agreement or deed of trust (R. 13-16), transferring certain securities therein mentioned to the same trustees upon almost identical trusts, viz: in trust to pay the income to Barney May, her husband, for his life, and thereafter to the grantor if she should survive him for her life, and upon the death of the survivor to transfer the corpus to their four children, equally, or the issue of such of them as might be then deceased. The only substantial difference between the trusts declared is that the paper of October 1, unlike the

informal paper of May 15, gave to each child who should die before the survivor of the grantor and her husband, a power of testamentary appointment over his or her share. No power of revocation or alteration or management was reserved to the grantor. Both instruments were executed while the Act of September 8, 1916 (39 Stat. 756, 777-780) as amended by the Act of March 3, 1917 (39 Stat. 1000, 1002) was in force, and before the passage of either the Revenue Act of 1918 (40 Stat. 1057, 1096-1101) or the Revenue Act of October 3, 1917 (40 Stat. 300).

The Record does not distinctly disclose whether the Deed of October 1, 1917, was simply the "formal instrument of trust" contemplated in the earlier paper, or whether the two instruments were separate and independent transfers. We assume that the former was the case, as the Commissioner valued at zero the property passing under the earlier instrument (R. 21).

Pauline May died on March 25, 1920, when the Revenue Act of 1918, approved February 24, 1919 (40 Stat. 1057, 1096-1101) was in force.

The Commissioner of Internal Revenue included the property passing under these instruments in the gross estate of the decedent for purposes of the Estate Tax under the Revenue Act of 1918; and accordingly collected an alleged deficiency of $5,524.42 (R. 18, 7) which the plaintiffs, executors of Pauline May, paid under protest on September 11, 1923 (R. 8). After claim for refund duly filed (R. 27-9), which was refused on February 20, 1924, by the Commissioner (R. 8, 29-31), the plaintiffs as executors instituted this suit on July 15, 1924 (R. 1).

A motion to strike out the Statement of Claim (R. 31), was granted and judgment entered for the defendant by the District Court (R. 38). The Circuit Court of Appeals for the Third Circuit affirmed this judgment on a *per curiam* opinion (R. 41), 32 Fed. (2d), 1017. The case is before this Court on writ of certiorari granted on October 21, 1929 (R. 43).

The only question is whether the property passing under the two instruments above mentioned is to be included in the gross estate for purposes of Estate Tax under the Revenue Act of 1918, (sec. 402 (c), 40 Stat. 1097), as property of which the decedent had made a transfer or created a trust intended to take effect in possession or enjoyment at or after her death. The transfers were made more than two years before Mrs. May's death and there is no claim or suggestion that they were in contemplation of death.

The Record does not distinctly show that Barney May survived his wife, the grantor, Pauline May, so that she did not in her lifetime receive any of the income or enjoy any benefit from the trust property after the execution of the deeds. But as it appears that he was living when the deeds were executed and as there is nothing to indicate that he died before his wife, the presumption is that he was still living when she died. At all events, it is stated in the Petition for Certiorari (p. 3) that he survived his wife and actually joined in filing the estate tax return as one of her executors, and certainly after his wife's death the Commissioner addressed to him a letter as one of the executors of his wife (R. 18). We stress this point because in the view we take of the case, the fact of his survivorship is of *very great importance.* The case would have been very different if Barney May had predeceased his wife, and if she had thus become entitled to the usufruct of the property during her life.

We respectfully submit:

1. That Section 402(c) of the Revenue Act of 1918, if construed to apply retroactively to transfers such as those in this case, is to that extent unconstitutional under the Fifth Amendment.

2. That the Act of 1918 is unconstitutional in so far as it may apply to transfers of the kind involved in this case, though made after its passage.

3. That the transfers in this case passed both possession and enjoyment from Pauline May in her lifetime, and did not take effect either in possession or enjoyment at or after her death.

I.

Sec. 402 (c) of the Revenue Act of 1918 in so far as it Applies to Irrevocable Transfers Executed Before its Passage Merely Because They Were Intended to Take Effect in Possession or Enjoyment After the Grantor's Death is Arbitrary, Capricious and Confiscatory, and Therefore in Conflict With the Fifth Amendment.

Historical Summary of Pertinent Portions of Estate Tax Legislation Down to Act of 1918.

Section 402(c) of the Revenue Act of 1918 is applicable by its terms to transfers intended to take effect in possession or enjoyment at or after death "whether such transfer or trust is made or created before or after the passage of *this Act.*"

The prior estate tax law—that is to say, the Act of September 8, 1916 (39 Stat. 756), as amended by the Act of March 3, 1917 (39 Stat. 1002), with the additions thereto made by the Act of October 3, 1917 (40 Stat. 300), did not contain the words printed in quotation marks in the foregoing paragraph, but was expressed to be applicable merely to property in respect of which the decedent "has at any time made a transfer" of the character specified. This Court held that the Act of 1916 by its proper construction was not intended to be retroactive so as to tax transfers executed before it was passed.

Shwab v. Doyle, 258 U. S. 529;
Union Trust Co. v. Wardell, 258 U. S. 537;
Levy v. Wardell, 258 U. S. 542;
Knox v. McElligott, 258 U. S. 546.

It being apparent by reason of the words "whether such transfer or trust is made or created before or after the passage of this Act" in the Revenue Act of 1918, that *that* Act was intended to apply retroactively to transfers of the kind specified made prior to its passage, the constitutionality of the Act in that respect was challenged in *Nichols v. Coolidge*, 274 U. S. 531; and the conclusion of this Court was expressed as follows:

> "We must conclude that Section 402(c) of the statute here under consideration,"—*i.e.*, the Revenue Act of 1918, approved February 24, 1919 (40 Stat. 1057)—"in so far as it requires that there shall be included in the gross estate the value of property transferred by a decedent prior to *its passage*"—*i. e.*, the passage of the Act of 1918 on February 24, 1919—"merely because the conveyance was intended to take effect in possession or enjoyment at or after his death, is arbitrary, capricious and amounts to confiscation. Whether or how far the challenged provision is valid in respect of transfers made subsequent to the enactment, we need not now consider" (274 U. S. 542-3).

The "statute here under consideration" was the Revenue Act of 1918, approved February 24, 1919. In a previous part of the opinion the Court quoted in full the "relevant portions of 'Title IV—Estate Tax' Act, February 24, 1919" (274 U. S. 534-6).

It is said, however, that the transfers involved in *Nichols vs. Coolidge*, were executed long prior, not merely to the passage of the Act of 1918, but also to the passage of the Act of 1916, and that the language of the Court should be construed as applicable only to transfers prior to September, 1916, and is at any rate a mere *dictum* so far as it may apply to transfers after September 8, 1916.

It is, indeed, almost inconceivable that this Court used the language "prior to *its* passage" inadvertently, and without considering the distinction between transfers executed before and after September 8, 1916; for one of the points most strongly emphasized by the defendants in error in *Nichols vs. Coolidge*, as well as in briefs of *amici curiae*, was that

the provision of the Act of 1918 that transferred property should be included "whether such transfer or trust is made or created before or after the passage of this Act" should be construed to apply only to such transfers prior to the passage of the Act of 1918 as were made subsequent to the passage of the first Federal Estate Tax Law—*i. e.*, subsequent to September 8, 1916. See brief for the Defendants in Error in *Nichols vs. Coolidge*, p. 27, and brief of Mr. Russell L. Bradford, *amicus curiae*, pages 13 to 20.

This Court overruled this point as to the construction of the Statute; and, its attention having been thus directed to the question of transfers made before the passage of the Act of 1918, but after September 8, 1916, concluded its discussion with the declaration that the Act is unconstitutional as to any such transfers made "prior to *its* passage" —*i. e.*, the passage of the Act of 1918.

As, however, the transfers involved in *Nichols vs. Coolidge* were executed before the passage of the Act of 1916, anything which fell from this Court as to transfers after September 8, 1916, and before February 24, 1919, may be in a sense a *dictum;* and therefore we shall endeavor to show that on principle there is no justification for distinguishing in this regard between transfers before and after September 8, 1916.

The Revenue Act of September 8, 1916, Title II, (39 Stat. 756, 777), imposed a graduated estate tax at rates ranging from 1% on "net estates" of less than $50,000 to 10% on estates of over $5,000,000. The Act of March 3, 1917 (39 Stat. 1000, 1002), amended this act by increasing the rates from 1½% in the lowest bracket to 15% in the highest. The amendatory act provided however that the estates of persons dying before its passage but after September 8, 1916, should continue to pay the old rates.

This was the state of the law when the informal trust agreement of May 15, 1917 (R. 12) and the more formal settlement of October 1, 1917 (R. 13-16) were executed.

Two days after the execution of the latter instrument, the Revenue Act of October 3, 1917 (40 Stat. 300) was

passed; and Title IX of this Act imposed an additional "War Estate Tax" on the estates of all persons thereafter dying, at rates beginning with ½% in the lowest bracket and going up to 10% on estates of more than $10,000,000 (40 Stat. 324). This act did not further *amend* the Act of 1916, but superadded a new and additional tax, as distinct from the ordinary estate tax as the Excess Profits Tax was from the Income Tax.

The combined rates of the ordinary Estate Tax and of the War Estate Tax began with 2% in the lowest bracket and ran up to 25% on estates of over $10,000,000.

Now, we opine that under the rule enunciated in *Nichols vs. Coolidge,* 274 U. S. 531, that a *retroactive* tax *of this kind* on transfers irrevocably made before the passage of the taxing act merely because the transfer was to take effect in possession or enjoyment at or after death is unconstitutional, there can be no reasonable doubt that if Pauline May had died while the Act of October 3, 1917 was in force, the new and additional tax imposed by that act could not have been collected from her estate, in respect to this transferred property. Her estate would have been subject to the tax imposed by the Act of September 8, 1916 as amended by the Act of March 3, 1917; and for purposes of *that tax* the transferred assets could have been constitutionally included in the gross estate, unless as urged *infra* pp. 20-7 the Act is unconstitutional even as to transfers executed after its passage. But the additional tax imposed by the Act of October 3, 1917, could not have been constitutionally applied retroactively to an irrevocable transfer made before its passage; and for the purposes of *that tax* the transferred assets could not have been included in the "gross estate."

Similarly, if an irrevocable transfer had been made after September 8, 1916, and before March 3, 1917, and the grantor had died while the amendatory act of the last mentioned date was in effect, it might have been possible to hold

that the *amendment* was unconstitutional as to the transferred property, leaving the lower rates fixed by the Act of 1916 applicable to the transferred property.

But before the death of Pauline May on March 25, 1920, the Revenue Act of 1918 (40 Stat. 1057) was passed. This Act (Sec. 1400 (a), 40 Stat. 1149) repealed outright Title II, called "Estate Tax" of the Act of 1916, Title III, called "Estate Tax" of the Act of March 3, 1917 (being the amendment increasing the rates imposed by the Act of 1916); and Title IX, called "War Estate Tax" of the Revenue Act of October 3, 1917, which imposed the separate and additional tax. In spite of the repeal, it was declared that the said repealed provisions should "remain in force for the assessment and collection of all taxes which have accrued thereunder, and for the imposition and collection of all penalties or forfeitures which have accrued and may accrue in relation to any such taxes" (Revenue Act of 1918, Sec. 1400 (b), 40 Stat. 1150). There was also a provision that the method of assessing and collecting estate taxes previously accrued under the Act of 1916 as amended by the Act of March 3, 1917, or under the Act of October 3, 1917, should be according to the Revenue Act of 1918.

But, for the future, the Revenue Act of 1918 provided in substance a *totally new system* differing in rates and in basis both from the Act of 1916 as originally passed and as amended by the Act of March 3, 1917, and from those acts as supplemented by the extra "War Estate Tax" imposed by the Act of October 3, 1917.

The following is a table of rates as imposed by the various Acts:

Amount of Net Estate.	Act of Sept. 8, 1916.	Act of March 3, 1917.	Act of Oct. 3, 1917, plus the Act of March 3, 1917.	Revenue Act of 1918.
Up to $50,000	1%	1½%	2%	1%
$50,000 to $150,000	2	3	4	2
$150,000 to $250,000	3	4½	6	3
$250,000 to $450,000	4	6	8	4
$450,000 to $750,000	5	7½	10	6
$750,000 to $1,000,000	5	7½	10	8
$1,000,000 to $1,500,000	6	9	12	10
$1,500,000 to $2,000,000	6	9	12	12
$2,000,000 to $3,000,000	7	10½	14	14
$3,000,000 to $4,000,000	8	12	16	16
$4,000,000 to $5,000,000	9	13½	18	18
$5,000,000 to $8,000,000	10	15	20	20
$8,000,000 to $10,000,000	10	15	22	22
Over $10,000,000	10	15	25	25

This, however, is only half of the story; for the Revenue Act of 1918 radically altered the method of computing the "net estate" on the transfer of which the tax is laid, so that in many cases a lower rate produced a larger tax.

The following are a few examples:

(1) The Revenue Act of 1918, unlike the Act of 1916, either as originally passed (*Shwab v. Doyle*, 258 U. S. 529; *Union Trust Company v. Wardell*, 258 U. S. 537; *Levy v. Wardell*, 258 U. S. 542; *Knox v. McElligott*, 258 U. S. 546) or as amended by the Act of March 3, 1917, and unlike the Act of October 3, 1917 (which applied to the same basis of taxation as the earlier acts) undertakes to include, retroactively, in the gross estate the value of property previously transferred in contemplation of death or to take effect after death (Revenue Act of 1918, Sec. 402(c), 40 Stat. 1097).

(2) The Revenue Act of 1918, unlike the earlier acts (*United States v. Field*, 255 U. S. 257) requires property passing under exercise of a general power of testamentary appointment to be included in the gross estate (Revenue Act of 1918, Sec. 402(e), 40 Stat. 1097).

(3) The Revenue Act of 1918 (Sec. 402(f), 40 Stat. 1097) requires that the gross estate shall include insurance taken out by the decedent on his own life and payable to his executor or (in excess of $40,000) to any other person; but none of the prior laws contain any similar provision.

(4) The Revenue Act of 1918 (Sec. 402(b), 40 Stat. 1097) provides that the interest of a surviving spouse by way of dower, curtesy, etc., shall be included in the gross estate; but no prior act contained any such provision.

(5) The Act of 1918 (Sec. 403(a)1, 40 Stat. 1098) forbids the deduction of income taxes upon income received after the death of the decedent, or any estate, succession, legacy or inheritance taxes; but the earlier laws contained no such clause.

(6) The Act of 1918 (Sec. 403(a)2, 40 Stat. 1098) allows a deduction for the value of property previously taxed, as part of the estate of another decedent dying less than five years earlier, under this Act or the Act of October 3, 1917; but no similar deduction was permitted by any former Act.

(7) The Act of 1918 (Sec. 403(a)3, 40 Stat. 1098) allows a deduction for charitable, etc., bequests; but no such deduction was previously permitted.

(8) The Act of 1918 (Sec. 403(b)1, 40 Stat. 1098) provides that in case of non-resident decedents, not more than 10% of the value of the gross estate situated in the United States shall be deducted for debts, etc., whereas in the earlier laws no limit was fixed.

Sundry other differences of greater or less importance might be pointed out.

At all events, it is clear that irrespective of any question of rates of tax it might often be better to be taxed under any of the earlier acts, even the Act of October 3, 1917, and *a fortiori* the Act of March 3, 1917, which was in force when Mrs. May's transfers were made, rather than under the Act of 1918, under which it is now sought to tax her estate.

For instance, suppose property worth $1,000,000 was settled upon the decedent with a general power of testamentary appointment, and he leaves $50,000 which he owned outright and having exercised by will the power of appointment. Under the Act of 1916 either as originally passed or as amended and added to by the Acts of 1917, there would be no tax. But under the Act of 1918 there would be a tax of $51,500.

If such a person on, say, October 30, 1917, had transferred his $50,000 to a trustee in trust for himself for life, with remainders over, he could do so with the assurance that no tax would be payable in respect of the transferred property under the existing law; but the Act of 1918, if valid, would sweep away the entire trust fund from the beneficiaries, whose rights had vested at the time the deed was executed.

Many other illustrations of the same kind might be given in which there would be in all respects the same injustice in applying the Act of 1918 retroactively to transfers made between September 8, 1916, and February 24, 1919, as if the transfer had been made prior to September 8, 1916, when the first estate tax law took effect.

It may be said, indeed, that there is nothing to show that the changes in the *basis* of taxation—*i. e.*, the method of computing the "net estate"—made by the Revenue Act of 1918 operated to the prejudice of this estate, so that her estate being less than $750,000, the Act of 1918 may have actually reduced the tax which would have been payable under the Act of March 3, 1917, which was in force when the transfers were made. But of course, it would be impossible in each individual case to ascertain whether the Act of 1918 or the Act in force at the time of the deed would produce the heavier tax, and hold the Act valid or invalid according as it would produce in the particular case a smaller or a larger tax. The fact is that on large estates, the Act of 1918 is almost sure to be more onerous than the Act of March 3, 1917, and on small estates it may or may not be more onerous according to circumstances.

The only possible course, therefore, is to hold that Section 402(c) of the Act of 1918 in so far as it requires that there shall be included in the gross estate the value of property transferred by the decedent "prior to its passage," because the decedent reserved the income for his life, is wholly unconstitutional.

Action of Treasury Department and Board of Tax Appeals.

After *Nichols v. Coolidge*, 274 U. S. 531, amendments to Treasury Regulations 63 (as to the Act of 1921), Regulations 68 (as to the Act of 1924), and Regulations 70 (as to the Act of 1926) were promulgated which undertake to apply those acts retroactively to all transfers made after September 8, 1916, even though made before the passage of the particular act in question.

T. D. Nos. 4064, 4065 and 4066, Cum. Int. Rev. Bull. VI-2, pp. 345-6, 340-1, 337-8.

Even the Treasury Department, however, has not presumed to make similar amendments to Regulations 37, relating to the Act of 1918, which this Court explicitly declared to be unconstitutional as to transfers executed prior to "its passage," and which is the Act involved in this case.

Moreover, the Board of Tax Appeals has refused to follow these amended regulations, and has repeatedly applied *Nichols v. Coolidge* to transfers made before the passage of the Act under which the tax is sought to be levied, even though made after September 8, 1916.

Alsop v. Comm'r of Int. Rev., 7 B. T. A. 848 (as to Act of 1921);

Duggan, Executor, v. Comm'r. of Int. Rev., 8 B. T. A. 482 (as to Act of 1921);

Northern Trust Co., Executor of Van Schaick, v. Comm'r of Int. Rev., 9 B. T. A. 96 (as to Act of 1921);

Johnson v. Comm'r of Int. Rev., 11 B. T. A. 534 (as to Act of 1921);

McCormick v. Comm'r of Int. Rev., 13 B. T. A. 423, 436 (as to Act of 1924);

Morsman v. Comm'r of Int. Rev., 14 B. T. A. 108 (as to Act of 1924);

Pacific S. W. Trust, etc., Bk., Executor of Sykes, v. Comm'r of Int .Rev., 16 B. T. A. 1437, modifying S. C., 14 B. T. A. 1372 (as to Act of 1921).

The impossibility of construing the Revenue Acts of 1918 or 1921 as continuations of the pre-existing laws and the necessity for regarding them as entirely new enactments, is illustrated by—

Harris v. Comm'r of Int. Rev., 5 B. T. A. 41.

In that case, the decedent in 1912 had taken out a policy of insurance on his own life, but by changing the beneficiary had made it payable to his wife on September 30, 1920. Under the Act of 1918, which was in force at the time of the change of beneficiary, the proceeds of this policy in excess of $40,000 would have been liable to estate tax as part of his estate; but the Revenue Act of 1921 repealed the Act of 1918, as the Act of 1918 had repealed the Act of 1916, although repeating *in totidem verbis* the insurance provisions of the Act of 1918. This Court had held that the Act of 1918 was not retroactive as to insurance policies taken out before its enactment unless the beneficiary had been changed after its passage (*Lewellyn v. Frick*, 268 U. S. 238); and the Board of Tax Appeals held that the same construction must be given to the Act of 1921, although the result was that a policy which (at least in the view of the Board) would have been taxable if the Act of 1918 had continued in force, escaped taxation. The opinion states:

> "We are of the opinion that with the repeal of Title IV of the Revenue Act of 1918, the authority to include in the gross estate the proceeds of the policy of insurance here in question was lost and that the right ceases and determines with the statute upon which it depends. The effect of the repeal of Title IV of the Revenue

Act of 1918 was to obliterate the repealed statute just as completely as if it had never been enacted into law, and it must be considered as a statute that never existed, except for the purpose set forth in Section 1400(b) of the Revenue Act of 1921" (5 B. T. A. 44).

This decision was acquiesced in by the Commissioner of Internal Revenue.

Cum. Int. Rev. Bull, VI-1, p. 3.

Answers to Arguments for Defendant.

The argument for the Defendant must be that although, as held in *Nichols v. Coolidge,* 274 U. S. 531, Congress has no power retroactively to impose a tax of this kind on irrevocable transfers previously executed, yet if it has once adopted an estate tax it may retroactively increase the rates and change the basis even as to transfers irrevocably made before the passage of the amendatory act. The argument must be that the presence of any estate tax on the statute books operates as a red flag to warn every citizen that the rates may be increased and the basis changed, so that the provision of the Fifth Amendment (as construed in *Nichols v. Coolidge,* 274 U. S. 531) against retroactive legislation of this kind may be circumvented.

If this argument needs any answer, it may be found, we submit, in—

Untermyer v. Anderson, 276 U. S. 440.

This Court there held that even the pendency of a bill in Congress retroactively taxing gifts is not such a warning to taxpayers as to avoid the prohibition of the Fifth Amendment against a retroactive tax of this sort, or make the tax constitutionally applicable to a gift made only a week before the bill was signed by the President.

Mr. Justice McReynolds, delivering the opinion of the Court said:

> "The taxpayer may justly demand to know when and how he becomes liable for taxes—he cannot foresee and ought not to be required to guess the outcome of pending measures" (276 U. S. 445-6).

If this be true, how could Mrs. May "be required to guess" that Congress would increase the rates in force at the time of her gifts from a maximum of 6% on a net estate of some $300,000 to 8% as was done by the Act of October 3, 1917, or that Congress would increase the basis by requiring the inclusion of property passing under a general power of testamentary appointment, property passing to her husband by courtesy or the like, and the amount of insurance taken out on her own life, as was done by the Revenue Act of 1918?

Reliance is placed by the Government on cases such as *Bear Lake Irrigation Co. v. Garland*, 164 U. S. 1, 11-12 and *Steamship Co. v. Joliffe*, 2 Wall. 450, 459, holding that when a statute is repealed and simultaneously re-enacted in substance, but with minor changes, the repeal and re-enactment operate substantially as an *amendment*, so that as to transactions covered by the old law it may be enforced with the amendments.

But such cases have nothing to do with the question of *constitutional power*. They raised,—at least this branch of them raised—no constitutional question whatsoever.

They give absolutely no countenance to the contention that Congress can circumvent a prohibition of retroactive legislation of any kind by passing it either as an amendment to, or as a repeal and re-enactment of, existing legislation.

For example, who has ever supposed that the constitutional prohibition of *ex post facto* laws can be got around by making an amendment to existing laws?

Who has ever dreamed that the prohibition of that form of retroactive legislation known as laws impairing the obligation of contracts can be evaded by calling the impairment of obligation an *amendment* to existing laws? Indeed, the Dartmouth College Case itself (4 Wheat. 518)

invalidated an *amendment* to the charter of Dartmouth College.

If such cases as *Bear Lake Irrigation Co. v. Garland, supra,* had *any* bearing on the case at bar, they would lead to the conclusion that the Act of 1916 as amended by the Act of March 3, 1917, should be applied to Mrs. May's Estate, with only such changes as could constitutionally be made.

But this, of course, was not what the Bureau of Internal Revenue did in the present case. No one claims that the Act of 1916 as amended should apply. The decision of the lower court is, not that the Act of 1916 as amended by the Act of March 3, 1917, should apply, but that the Act of 1918 should apply *in toto*—both as to rate and basis, including property irrevocably transferred before its passage. Our point is that this is forbidden by the Fifth Amendment as construed in *Nichols v. Coolidge,* 274 U. S. 531, and *Untermyer v. Anderson,* 276 U. S. 440. That contention is not affected by the question whether the Act of 1918 can be regarded under the rule in the Bear Lake Irrigation Case as an amendment to the Acts of 1916 and 1917. The contention would be just as strong if the Act of 1918 were an amendment.

We do not believe, however, that the Act of 1918 is within the rule in the Bear Lake Irrigation Case. It is in form at least entirely new legislation, expressly declared to be "in lieu" of all the earlier tax laws. It is not substantially the same, but radically different, both as to the basis and as to the rate of taxation.

It would be perfectly impracticable to hold that the Acts of 1916 and 1917 remain in force as to Mrs. May's Estate except as constitutionally altered by the Act of 1918. Congress contemplated but one estate tax, not two, on Mrs. May's Estate. There is no doubt that as to all property except the transferred assets, the tax must be computed under the Act of 1918, and it would defeat the intention of Congress to compute separately a tax on the transferred

assets under the Act of 1916 as amended by the Act of March 3, 1917.

Perhaps it would have been constitutionally possible for Congress to declare that a tax should be computed under the Act of 1918 but excluding the transferred assets from the gross estate, and that another tax should be computed under the Act of 1916 as amended by the Act of March 3, 1917, including the transferred assets as part of the estate, and that the higher of the two should be paid. *But most certainly it has done nothing of the kind.* The courts, it is submitted, cannot rewrite the law so as to produce that result.

Indeed, the intention of Congress that the Acts of 1916 and 1917 should be *altogether inapplicable* to Mrs. May's estate is clear. Section 401 of the Revenue Act of 1918 provides as follows:

> "Sec. 401. That (in lieu of the tax imposed by Title II of the Revenue Act of 1916, as amended, and in lieu of the tax imposed by Title IX of the Revenue Act of 1917) a tax equal to the sum of the following percentages of the value of the net estate (determined as provided in Sec. 403) is hereby imposed upon the transfer of the net estate of *every decedent dying after the passage of this Act*, whether a resident or a non-resident of the United States."

As Mrs. May died after the passage of the Act of 1918, it is clear that her estate is subject to the tax imposed thereby, and that the tax so imposed is "in lieu" of any tax imposed under the Acts of 1916 and 1917. Congress has clearly declared that the Acts of 1918, and it alone, shall govern Mrs. May's estate. In so far as it can not constitutionally apply thereto, there is no law in force taxing the same.

Further, Section 1400 of the Revenue Act of 1918 provides as follows:

> "Sec. 1400. (a) That the following parts of Acts are hereby repealed, subject to the limitations provided in subdivision (b): * * *
>
> "(1) The following titles of the Revenue Act of 1916: * * *

"Title II (called 'Estate Tax'); * * *

"(2) The following parts of the Act entitled 'An Act to provide increased revenue to defray the expenses of the increased appropriations for the Army and Navy and the extensions of fortifications, and for other purposes,' approved March 3, 1917:

"Title III (called 'Estate Tax'); * * *

"(3) The following titles of the Revenue Act of 1917: * * *

"Title IX (called 'War Estate Tax'); * * *

"(b) Such parts of Acts shall remain in force for the assessment and collection of all taxes which have accrued thereunder, and for the imposition and collection of all penalties or forfeitures which have accrued and may accrue in relation to any such taxes, and except that the unexpended balance of any appropriation heretofore made and now available for the administration of any such part of an Act shall be available for the administration of this Act or the corresponding provision thereof: * * * Provided further, That the assessment and collection of all estate taxes, and the imposition and collection of all penalties or forfeitures, which have accrued under Title II of the Revenue Act of 1916 as amended by the Act entitled 'An Act to provide increased revenue to defray the expenses of the increased appropriations for the Army and Navy and the extensions of fortifications, and for other purposes,' approved March 3, 1917, or Title IX of the Revenue Act of 1917, shall be according to the provisions of Title IV of this Act. In the case of any tax imposed by any part of an Act herein repealed, if there is a tax imposed by this Act in lieu thereof, the provision imposing such tax shall remain in force until the corresponding tax under this Act takes effect under the provisions of this Act."

Now Congress has expressly declared that the Acts of 1916 and 1917 shall remain in force for the assessment and collection of all taxes which have accrued thereunder, and until the estate tax imposed in lieu of the taxes imposed by the earlier Acts shall take effect under the provisions of the Act of 1918. As Mrs. May was not dead at the date of the passage of the Act of 1918, so that no tax had ac-

crued under the Acts of 1916 and 1917, and as before she died the Estate Tax imposed by the Act of 1918 had taken effect, this provision is not applicable.

Congress has in effect said that the Acts of 1916 and 1917 shall be repealed except as to the estates of persons dying before the passage of the Act of 1918, and that even in that case the method of assessing and collecting the taxes imposed by the earlier laws shall be according to the Act of 1918.

Having therefore expressly declared that the Acts of 1916 and 1917 shall remain in force for a particular purpose which does not touch the case at bar, Congress has by necessary implication declared that the Acts of 1916 and 1917 shall not remain in force for any other purpose. *Expressio unius exclusio alterius.*

Some difference of judicial opinion has existed as to whether the parallel clause in the Act of 1921 had the effect of relieving from any payment of tax the estates of persons who had died within one year prior to the passage of the Act of 1921. The contention that it did so was based on the provision of the saving clause in the Act of 1921 to the effect that the Act of 1918 should remain in force for the assessment and collection of all taxes which had "accrued" under the Act of 1918. It was contended that a tax could not be said to have accrued until it was due. This argument prevailed in *Wilmington Trust Co. v. U. S.*, 28 Fed. (2d), 205, but the weight of authority is to the contrary.

Hanna v. United States, Court of Claims, decided Nov. 4, 1929;
Flannery v. Willcuts, 25 Fed. (2d), 951;
Page v. Skinner, 298 Fed. 731.

Both lines of authorities, however, agree that the earlier Act is absolutely repealed except as to matters within the saving clause—the only point in these cases bearing upon the matter now in hand. The Court of Claims, after quoting the saving clause, said:

> "A casual survey of the provisions set forth above clearly shows that the intent and purpose of Congress

was that the estates of all those who died prior to the enactment of the 1921 Act should be taxed under the 1918 Statute, and the estates of those who died after the enactment of the 1921 Act taxed under the provisions of the later Act. In fact, this intent is so plain that he who runs may read and understand."

The Board of Tax Appeals, in reaching the same conclusion, fully recognized that the earlier act is absolutely repealed except as to cases within the saving clause:

> "The question is thus narrowed to whether the tax involved here had accrued on November 23, 1921. If it had not accrued, the decedent's estate is not subject to any estate tax, regardless of the amount of the net estate."
>
> Guaranty Trust Co. v. Commr. of Int. Rev., 16 B. T. A. 314, 317-8.

If, therefore, as we contend, the Act of 1918 can not constitutionally be applied to transfers irrevocably consummated by Mrs. May before its passage, it follows necessarily that those transfers can not be taxed at all.

II.

The Revenue Act of 1918 is Arbitrary, Capricious and Confiscatory, in so far as it May Apply to Transfers of the Kind Involved in This Case Even Though Made After the Passage of the Act; and is Therefore in Conflict With the Fifth Amendment.

In *Nichols v. Coolidge* this Court left open the question whether the Revenue Act of 1918 is unconstitutional even as to subsequent transfers. The opinion of the Court concludes as follows:

> "Whether or how far the challenged provision"—*i. e.*, the provision that property transferred irrevocably by a decedent prior to his death shall be included in the taxable estate at its value at the time of the decedent's death merely because the conveyance was intended to take effect in possession or enjoyment at or after his

death—"is valid in respect of transfers made subsequent to the enactment we need not now consider" (274 U. S. 543).

We start with the proposition upon which the decision in *Nichols v. Coolidge* is based, that—

> "A statute purporting to tax may be so arbitrary and capricious as to amount to confiscation and offend the Fifth Amendment" (274 U. S. 542).

To show the "arbitrary and capricious" character of the present "tax," let us take a few illustrations. A man worth, say; $1,000,000 settles one-half of his fortune upon trust for himself for life, with remainder to a collateral relative, or strangers to his blood. The trustee by wisely retaining the original investments, or by wisely changing investments, succeeds in augmenting the trust estate, originally $500,000, to $4,000,000. The estate which the grantor retains does not increase in value. If the trust estate is included at its value at the time of the grantor's death, the tax under the Revenue Act of 1918 would be $542,500, and thus the estate which the grantor had reserved for his wife and family would be absolutely wiped out by circumstances over which he had no control whatsoever.

The recent Federal Revenue Acts have remained in force only a comparatively few years, but their constitutionality must be judged, of course, by supposing them to be, as they are on their face intended to be, permanent. For example, if the Revenue Act of 1918 would be valid as to a decedent who had made a transfer on the day after its passage, and was struck by lightning the next day, it would necessarily also be valid if the same decedent had lived for forty years afterwards. Conversely, if it would be invalid in the latter case, it must also be invalid in the former.

In other words, in order to determine whether the Act is arbitrary and capricious in character, we cannot take into account the fact that it remained in force for only a few years. It can't be valid for a brief period, and invalid after the lapse of a time.

According to its terms, if a man made a transfer in 1919, reserving the income to himself for life, but no power whatsoever over the property, the estate which he might leave, say, in 1950, would be affected by what the trustee had done during the intervening years.

It may be said that the provision is necessary to prevent evasion; but is it not true that all legitimate purposes of tax evasion may be accomplished by taxing only transfers made after passage of the statute in contemplation of death—that is, transfers made when death from some existing peril other than the natural frailty of the human body is anticipated in the "near future," and when such anticipation is the moving cause of the deed? As said by this Court in *Nichols v. Coolige*:

> "Undoubtedly, Congress may require that property subsequently transferred in contemplation of death be treated as part of the estate for purposes of taxation. This is necessary to prevent evasion and give practical effect to the exercise of admitted power, but the right is limited by the necessity" (274 U. S. 542).

If, in addition, property is taxed over which the decedent reserved dominion, as by a power of revocation, as the law undoubtedly does (*Reinecke v. Northern Trust Co.*, 278 U. S. 339), surely the requirements of the prevention of tax evasion would be met.

Finally, if it be necessary for the prevention of tax evasion to include property which the decedent had transferred, reserving the income to himself for life, the only reasonable way would be to make the tax depend upon the *then* value of the property, rather than its value as enhanced by subsequent circumstances over which the grantor had no control whatsoever.

The Revenue Act of 1918 provides that the value of the gross estate shall be determined by including the value *at the time of the decedent's death* of all property of which he has at any time, whether before or after the passage of the Act, made a transfer or created a trust intended to take effect in possession or enjoyment at or after his death:

"That the value of the gross estate of the decedent shall be determined by including the value at the time of his death of all property, real or personal, tangible or intangible, wherever situated.

* * * * * * * * * *

"(c) To the extent of any interest therein of which the decedent has at any time made a transfer, or with respect to which he has at any time created a trust—(1) in contemplation of or (2) intended to take effect in possession or enjoyment at or after his death (whether such transfer or trust is made or created before or after the passage of this Act), except in the case of *bona fide* sale for a fair consideration in money or money's worth. * * *"

Now, if property is transferred to a trustee upon trust for the grantor for life with remainders over upon his death, and the power to vary investments is given to the trustee, the question arises whether the value at the time of the grantor's death is to be computed with reference to the property which he transferred, or to the property which the trustee holds by change of investments, at the time of his death. In either event, the Act is equally arbitrary and capricious.

If the Act means that the property originally transferred is to be included at its value at the time of the decedent's death, irrespective of the fact that it has been sold by the trustee in the meantime,—and such is certainly what the act says—then the tax will be levied in respect of property which has passed entirely out of the hands not merely of the grantor, but of all those whom he intended to benefit, so that perhaps for years before his death neither he nor they had any interest whatsoever in it.

For example, suppose a deed of trust is made of certain stock worth at the time $10,000. The Trustee immediately exercises a power of sale, and invests the $10,000 thus obtained in bonds which are worth at the time of the grantor's death exactly the amount paid for them. But, suppose the stock of which the trust estate originally consisted greatly increases in value, and is worth at the time of the grantor's

death $500,000. Is a tax to be levied with respect to this $500,000, and thus completely wipe out the trust estate? Nothing could be more absurd or irrational. Yet such is certainly the literal language of the statute. The property which the testator transferred was the stock and not the bonds. The Act declares that the gross estate shall be calculated by including the value at the time of the decedent's death of all property of which he has at any time made a transfer or created a trust to take effect in possession or enjoyment at or after his death. The only property which he so transferred was the stock.

If on the other hand the taxable estate is to be computed by taking the value of the trust investments as they exist at the time of the testator's death—as was assumed in *Frew v. Bowers,* 12 Fed. (2d) 625, 628, (2nd C. C. A., June 1, 1926), and made the basis for concluding that the Act is unconstitutional—the result is equally arbitrary and capricious. In *Frew v. Bowers,* just cited, the property had increased in value by prudent reinvestments by the trustee from $200,000 at the time of the transfer to $500,000 at the time of the grantor's death. Where the grantor reserves no power to control the investments, his estate is thus to be taxed by reason of circumstances over which he had no control and from which he could derive no benefit. Could anything be more arbitrary and capricious?

Judge Hough in *Frew v. Bowers,* said:

> "A tax on a transfer by A, but measured by anything other than the estate of A, may be a duty or excise in form, but it is a palpable effort to tax something other than the transfer" (12 Fed. (2nd) 625, 628).

When it is borne in mind that the Act of 1918 is by its terms a permanent enactment intended to last for an indefinite period, it will be seen that all the circumstances which this Court mentioned as showing the "arbitrary, whimsical and burdensome character of the challenged tax" would apply as well to subsequent transfers as to transfers previously executed.

This Court said in *Nichols v. Coolidge*, 274 U. S. 531:

> "An excise is prescribed, but the amount of it is made to depend upon past lawful transactions, not testamentary in character, and beyond recall. Property of small value transferred before death may have become immensely valuable, and the estate tax, swollen by this, may leave nothing for distribution. Real estate transferred years ago, when of small value, may be worth an enormous sum at the death. If the deceased leaves no estate there can be no tax. If, on the other hand, he leaves ten dollars both that and the real estate become liable. Different estates must bear disproportionate burdens determined by what the deceased did one or twenty years before he died" (274 U. S. 542).

If the Act had been limited to transfers made within some reasonable period anterior to the grantor's death—say, one or two years—a somewhat different question would have been raised. But applicable as the Act is, not merely to such transfers made within a reasonable time prior to his death, but to all transfers made after its enactment, whether made within one, or ten, or twenty, or thirty years before death, it is submitted that the provision is "so arbitrary and capricious as to amount to confiscation and offend the Fifth Amendment."

The only reason for holding the tax valid as to transfers made after its passage which does not apply to transfers made before it became effective, is that in the former case both the grantor and the grantees know that the transferred estate at its value at the time of his death will be included as part of his taxable gross estate. But what good does it do them to know this? They cannot foretell what the value will then be, or what estate the grantor may leave. Therefore, nobody can in any possible way compute what the tax will be. They cannot even tell whether there will be any tax. They are in quite as bad a fix as if there had been no estate tax law in effect; for even then they would know, of course, that Congress might pass such an act.

This makes the arbitrary character of the statute still more apparent. If property which was transferred by an irrevocable transfer, and which is absolutely vested (subject to an equitable life estate in the grantor) is to be taxable or not according to whether the grantor subsequently has successes or reverses in business, then indeed you have a tax laid by chance rather than according to any conceivable rule of reason. It would be just as sensible to say that the liability to tax should be determined by flipping a coin or throwing a die.

Moreover, this Court has repeatedly held that the Federal Estate Tax is levied upon a transfer by death or upon an interest which ceased by reason of death.

Y. M. C. A. v. Davis, 264 U. S. 47, 50;
Edwards v. Slocum, 264 U. S. 61, 62-3;
Greiner v. Lewellyn, 258 U. S. 384, 387.

This being true, how can the tax be constitutionally imposed on the full value of transferred property although the only interest which the decedent reserved and the only interest which came to an end with his death was a remote contingent interest infinitesimal in value in comparison with the value of the whole property transferred?

The recent decision of this Court, upholding the Gift Tax provisions of the Revenue Act of 1924, as applied to gifts made after the passage of the Act (*Bromley v. McCaughn*, 280 U. S. 124) may be thought to have some adverse bearing; but in point of fact it only brings into sharper relief the vice in Section 402 (c) of the Revenue Act of 1918. Both laws, indeed, "tax" gifts; but there the resemblance stops. The amount of the Gift Tax was fixed at the time of the gift, and was measured by the value of the property given, and by its value at that time. But the provision now challenged grades the rate of tax according to purely fortuitous circumstances—namely, the amount of other property which the donor may happen to own at the time of his death. Moreover, the rate of tax is fixed not by the value of the property given—nor even by

the value of the donor's remaining property—*at the time of the gift*, but by values at some date in the perhaps remote future, and by values affected by the character of management—prudent or imprudent re-investments—in the meantime.

III.

Mrs. May's Deeds of Trust Were Present, Outright Transfers and Were Not Intended to Take Effect in Possession or Enjoyment At or After Her Death Within the True Construction of the Revenue Act of 1918.

We trust we have demonstrated that Sec. 402 (c) of the Revenue Act of 1918, in so far as it undertakes to exact estate tax in respect of Mrs. May's transfers, irrevocably executed before the passage of that Act, on the ground that they were to take effect in possession or enjoyment at or after her death, are unconstitutional under the decisions of this Court. At all events, it can hardly be denied that the foregoing contentions raise "a grave constitutional question." And of course, as every law-student knows, if there is any reasonable way, by construction or otherwise, of avoiding the decision of "a grave constitutional question," this Court conceives it its duty to adopt it.

United States v. Del. & Hudson Co., 213 U. S. 366, 407-8;
Lewellyn v. Frick, 268 U. S. 238, 251;
Missouri Pac. R. R. Co. v. Boone, 270 U. S. 466, 471-2.

Indeed, in *Reinecke v. Northern Trust Co.*, 278 U. S. 339, 348-9, this Court held that this very constitutional question is such "a grave constitutional question" as to necessitate any reasonable construction of the Statute in order to avoid its decision.

We shall now endeavor to show that it is quite unnecessary to decide any constitutional question, because the transfers here involved are not within the Revenue Act of 1918, Sec. 402 (c), properly construed.

Tranfer Not Taxable Merely Because Remainders to Children Are Limited to Vest in Possession After Grantor's Death.

The learned Judge of the District Court* rested his decision squarely on the ground that if a deed of trust contains such limitations that estates in remainder are bound to vest in possession after the death of the grantor, then the whole deed is deemed to be intended to take effect in possession or enjoyment at or after the grantor's death, even though the grantor reserved no interest in, or benefit from, the property during his lifetime. He said:

> "It is certainly true, that the property covered by the gift included in the gross estate, came into possession or enjoyment of the donees only after the death of the donor. It seems to be settled by the authorities that the phrase 'to take effect in possession or enjoyment at or after death,' is used to designate a situation in which the donee's rights with respect to the property (as distinguished from an estate or interest in the property) change at, or after, and because of, the donee's death. It is perfectly clear that the donor by adopting a trust form of conveyance, manifested her intention that the property should not come into the present possession of the beneficiaries. By providing in effect for the termination of the trust after death, the possession is made to take effect at that time. While it is true that the trust may be said to take effect in enjoyment at once, the settlor by imposing the trust has made a transfer of the corpus, which not only was intended to, but actually does, take effect in possession after death. From its very nature a trust deprives the beneficiaries of possession as long as the trust continues." (R. 34-5.)

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* It should be added that the learned Judge of the District Court in his opinion cites the case of *Shukert v. Allen*, 6 Fed. (2d) 551, in the Circuit Court of Appeals (R. 36), but seems unaware of the fact that this decision had been reversed by this Court in *Shukert v. Allen*, 273 U. S. 545. Strange too, he cites *Nichols v. Coolidge*, 4 Fed. (2d) 112, in the District Court (R. 37), but seems unaware of the fact that this judgment had been reviewed by this Court on writ of error. *Nichols v. Coolidge*, 274 U. S. 531. It is also strange that Judge Thomson, although he cites cases in sundry State Courts as to State statutes, nowhere mentions the opinion of the Circuit Court of Appeals for the Eighth Circuit in *Reinecke v. Northern Trust Co.*, 24 Fed. (2d) 91, which was later affirmed, so far as material to the present case, by this Court. Nor does he cite or refer to the decision of Judge Rose in *Curley v. Tait*, 276 Fed. 840, 842, a case which was absolutely on all fours with the case at bar.

And again, later on in his opinion, he says:

> "The persons who were to take the corpus could not be determined until after the founder's death. How could it be said, therefore, that either the property or an interest therein is in possession or enjoyment at a time when the person who is to own the property is not ascertained"? (R. 37.)

Now, of course, it is obvious that this reasoning is altogether inconsistent with the decision of this Court in—

Reinecke v. Northern Trust Co., 278 U. S. 339.

That case involved five irrevocable trusts, in all of which it was provided that the corpus should not come into the possession of the beneficiaries until after the grantor's death. Some of them provided for accumulation of the income in whole or in part during the grantor's lifetime (see report of same case in the lower Court, 24 Fed. 2d 91, 92), and some of them provided that some or all of the income should be paid to beneficiaries during the grantor's lifetime, though the corpus was not to come to them until after her death. This Court said:

> "But the question much pressed upon us remains, whether, the donor having parted both with the possession and his entire beneficial interest in the property when the trust was created, the mere passing of possession or enjoyment of the trust fund from the life tenants to the remaindermen after the testator's death, as directed, and after the enactment of the statute, is included within its taxing provisions. That question, not necessarily involved, was left unanswered in *Shukert v. Allen*, 273 U. S. 545. There the gift of a remainder interest, having been made without reference to the donor's death, although it did in fact vest in possession and enjoyment after his death, was held not to be a transfer intended to take effect in possession or enjoyment at or after the donor's death, and for that reason not to be subject to the tax. But here the gift was intended to so take effect, although the transfer which effected it preceded the death of the settlor and was itself not subject to the tax unless made so by the circumstances that the possession or enjoyment passed as indicated." (278 U. S. 347.)

Again, this Court said:

> "One may freely give his property to another by absolute gift without subjecting himself or his estate to a tax, but we are asked to say that this statute means that he may not make a gift *inter vivos*, equally absolute and complete, without subjecting it to a tax if the gift takes the form of a life estate in one with remainder over to another at or after the donor's death. It would require plain and compelling language to justify so incongruous a result and we think it is wanting in the present statute." (278 U. S. 347.)

After this authoritative interpretation of the law, it is obvious that the foundation of Judge Thomson's opinion is cut away, and that the superstructure must fall.

Under such circumstances it would be a waste of time to discuss decisions of State Courts construing State statutes which were relied upon by Judge Thomson in the Court below (R. 36). We may remark in passing, however, that one patent fallacy in attempting to apply State cases as authorities upon the construction of the Federal statute is that the State cases related to taxes upon the several estates or legacies, whereas the Federal Tax is on the estate as a whole. In other words, if a statute taxes the transfer of any individual estate which vests in possession after the grantor's death, it may plausibly be contended that where a remainder is to vest in possession after death, the remainder must be taxable, though supported by a particular estate which vested in the grantor's lifetime; but where the tax is laid upon the passing of the estate as an entirety, it makes absolutely no difference to whom it goes so long as it passes from the grantor, and the shifting of estates in the property from one person to another is quite immaterial.

The distinction made in the last paragraph is not the technical distinction between a tax on the right to transmit and a tax on the right to receive, but between a tax on the transfer (or receipt) of the estate as a whole and a tax on the transfer (or receipt) of particular legacies, shares or estates.

The late Judge John C. Rose in *Curley v. Tait*, 276 Fed. 840, one of the earliest cases construing the Federal estate tax laws, a case practically identical on the facts with the case at bar, with that legal perspicacity which was so characteristic of him, anticipated the decision of this Court in *Reinecke v. Northern Trust Co.*, 278 U. S. 339, saying:

> "If all beneficial ownership and possession irrevocably passes from the transferor at the time of the transfer, it would seem to be immaterial whether it goes to one person or to several, and, if to several, whether their enjoyment is to be simultaneous or successive, and, if the latter, at what time or upon the happening of what event the rights of one give place to those of the other" (276 Fed. 842).

The Reservation of a Contingent Life-Estate in Remainder.

The only possible distinction between the present case and *Reinecke v. Northern Trust Co.* is that here a contingent equitable life estate was reserved to the grantor if she should survive her husband, Barney May,—an event which never happened—whereas in *Reinecke v. Northern Trust Co.* nothing was reserved to the grantor beyond a power to alter the trusts with the consent of all or a majority of the beneficiaries, and a power to supervise the investment of the trust funds and vote the trust stocks.

Now we have the simple case where a woman settles property upon trust for her husband for his life with remainder to herself for her life if she should survive him, and after her death to her children or their issue. In order to support the decision below the Government must contend that the reservation of this contingent life estate to the grantor, a reservation which never came into effect and from which she never derived the least benefit, nevertheless makes *the entire transfer* taxable.

In this connection, when we speak of the equitable life estate in remainder reserved to Mrs. May as "contingent," we are not using that word in the sense in which it is used in the law of real property. Technically, no doubt, the

remainder was vested, as the only contingency was the termination of the preceding estate before the expiration of the life estate in remainder. But tax laws are practical matters, and do not regard the technicalities of the feudal law of real property. For all practical purposes, Mrs. May's estate in remainder was a contingent one, and of very problematical value. So, where property is limited to A for 2,000 years, remainder to B for life, remainder to C in fee, the remainder to B is technically vested, but not even an antediluvian patriarch could have the remotest hope of ever enjoying it, and it could not be sold for the tenth part of a peppercorn.

Under Section 402 (c) of the Revenue Act of 1918, that which is to be included in the gross estate is "any interest * * * of which the decedent has at any time made a transfer or with respect to which he has at any time created a trust * * * intended to take effect in possession or enjoyment at or after his death"—that is to say, "any interest" of which the decedent has reserved to himself the benefit during his life.

As demonstrated by *Reinecke v. Northern Trust Co.*, 278 U. S. 339, an "interest" in property is transferred, or setlted in trust, so as to take effect in possession or enjoyment at or after the grantor's death, only when the beneficial enjoyment of that "interest" is reserved to the grantor during his life. It is immaterial that a remainder can vest in possession only after the grantor's death if it is supported by a particular estate which vests in possession during his lifetime.

Now, in the ordinary case where the grantor reserves to himself *a certain proportion* or *part* of the income for his life, it is quite clear that the "interest" which is settled to take effect in possession or enjoyment after his death, is the *same proportion,* or *corresponding part* of the principal. This has been consistently recognized by the Treasury Regulations:

"Where the grantor reserves a proportionate part of the income, only a corresponding proportion of the property should be included in the gross estate, unless the transfer was made in contemplation of death. If, for example, he reserves one-half of the income, the value of one-half of the property transferred should be included in the gross estate. If he reserves an annuity, so much of the property as is necessary to produce the annuity should be included in the gross estate. Where the property does not produce income, its value as of the date of the decedent's death should be ascertained, and so much of this sum as is necessary to produce the annuity should be included in the gross estate."

Regulations 37, Art. 24 (as to the Act of 1918).

Cf. Regulations 63, Art. 19 (as to the Act of 1921); Regulations 68, Art. 18 (as to the Act of 1924); Regulations 70, Art. 18 (as to the Act of 1926).

Where the reservation is of some *definite proportion,* or some *fixed part—e. g.,* an annuity—of the income, the computation is comparatively easy, and the case perfectly clear. If the grantor reserves one-half of the income during his life, the "interest" which the grantor has transferred in such a way as to take effect in possession or enjoyment after his death is one-half of the corpus. If the grantor reserves an amount of $10,000, the "interest" so settled is so much of the corpus as will produce a net income of $10,000 a year.

If the reservation is of some trivial or insignificant right, not affecting in any substantial degree "the economic benefits or enjoyment of the property," it may be wholly disregarded. This is demonstrated by *Reinecke v. Northern Trust Co.,* 278 U. S. 339, where this Court held that the reservation to the grantor of a right to control the trust investments, and to vote the trust stocks, during his life, and even to alter the trusts with the consent of a majority of the *cestuis que trust,* is immaterial.

On the other hand, if the entire income is reserved to the grantor subject only to some absurdly improbable contingency — for example, unless the independence of the United States shall cease — we suppose no one would doubt but that the contingency should be disregarded and the transfer as a whole held to take effect in possession or enjoyment after the grantor's death.

In the present case, the whole income was in a certain contingency — which never happened — reserved to the grantor. She never in fact received any benefit from the reservation, and she had but a slim chance of ever doing so—how slim we do not know.

The record does not disclose the age of either Mrs. Pauline May, the grantor, or Barney May, her husband, so that we can not compute by any mortality tables the value of the chance that Mrs. May might survive her husband.

The contingent and problematical benefit reserved to Mrs. May was even more illusory, uncertain and negligible as a reservation of "economic benefits and enjoyment of the property" than the reservation of a right to control investments and to vote in respect of the trust stocks, both of which were held immaterial in *Reinecke v. Northern Trust Co.*, 278 U. S. 339.

Three views are possible, indeed, in such a case as the present, as it would seem to us:

1. That in view of the uncertain and problematical character of Mrs. May's reserved equitable life estate in remainder, it should be disregarded for Federal tax purposes.

2. That regard should be had to the events which have happened, so that if Barney May had predeceased his wife and she had come into enjoyment of her equitable life estate, then the transfer should be deemed to have taken effect in possession or enjoyment at or after her death, but that in the events which have actually happened in the present case, no tax in respect of this transfer should be imposed.

3. That the Court should endeavor to calculate by reference to mortality tables the value of Mrs. May's equitable life estate, and treat as taxable, at its value at the time of her death, that portion of the trust property a present estate in which for Mrs. May's life would, at the time of the execution of the deed, have equalled the value of her contingent life estate in remainder in the whole.

The third of these alternatives seems to have been that preferred by Judge Rose in *Curley v. Tait,* 276 Fed. 840, 842, but all that he *decided,* on this branch of the case, was that the reservation of the contingent life estate in remainder did not render the *whole property* taxable. At all events, this Court has said that mathematical formulas are, if possible, to be avoided in matters of taxation, and the complexities of any such method would seem to us to render preferable one or the other of the other two possible views above mentioned, both of which lead to the same result on the facts of this case.

As laid down in *Reinecke v. Northern Trust Co.,* if Mrs. May had not in her lifetime "any control over the economic benefits and enjoyment of the property" (278 U. S. 346), no part of the trust property is taxable. The tax is imposed upon the shifting of the economic interests in the trust property (*ibid.*); and the question is whether in any proper sense of the word Mrs. May could be held to have had during her lifetime "any control over the economic benefits and enjoyment of the property," or whether there could be held to have been upon her death any real passing of the economic interest in the property from her. It would seem that the contingent life estate reserved to Mrs. May was too uncertain and illusory in character to be regarded at all, particularly in view of the fact that Mrs. May predeceased her husband, so that this estate never actually came into possession or enjoyment. In the events which have happened, Mrs. May parted with the entire estate as completely as if she had made an outright deed of the same. From the day of the execution of the deed she never had one particle of

beneficial interest or enjoyment in the property. She derived no economic benefit from the same.

If it be said that it is impossible to determine whether Mrs. May reserved any substantial benefit, and if so how much, the result would be that the transferred assets should not be included in the gross estate. For, the rule, of course, is well-settled that *prima facie*, a citizen is free from tax, and that in order to hold him liable to tax all doubts must be resolved in his favor.

Reinecke v. Northern Trust Co., 278 U. S. 339, 348;
Gould v. Gould, 245 U. S. 151, 153;
United States v. Merriam, 258 U. S. 179, 187.

It is Unnecessary Now to Determine How Much, if Any, of the Trust Property Should Be Included in the Gross Estate.

The Commissioner of Internal Revenue included the whole value of the trust property in the gross estate, and the Government assessed and collected a tax accordingly. If *any part* of that value ought not to have been included in the taxable estate, the tax so collected was excessive, and the plaintiffs were entitled to recover something.

At the present time, therefore, all that it is necessary for the Court to decide is that the whole value of the transferred property cannot lawfully be included in the taxable estate. If the tax on any portion of that value was improper, it was error to strike out the statement of claim, and thus, in effect, sustain a demurrer thereto. In *Curley v. Tait*, 276 Fed. 840, 842, already cited, Mr. Grafflin, had made a deed of trust in trust for his wife for her life, with remainder to himself for his life, and with ultimate remainder in fee to a charity. The case arose on demurrer to the declaration; and Judge Rose, after pointing out that the utmost which could be taxed was that interest, if any, in the property of which the grantor retained the benefit during his life, and

after pointing out the difficulty in calculating the amount of that interest, particularly in view of the fact that in the events which had happened he actually had no benefit from the trust property during his life, said:

> "At the hearing the government was so confident that it was entitled to tax the full value of his interest, and the plaintiff so certain that none of it should be taxed, that neither of them discussed the question now mooted. As from what has been said it follows that the entire interest was not taxable, the demurrer to so much of the plaintiff's declaration as seeks to recover the tax exacted on all of it must be overruled. The question of whether the government was entitled to any part of the tax less than the whole need not be passed upon, and should not be, until the Court is enlightened by further argument" (276 Fed. 842).

We submit, therefore, that *beyond doubt,* under the decision in *Reinecke v. Northern Trust Co.,* this transferred property cannot, to the extent of the full value thereof, be treated as property of which Mrs. May made a transfer to take effect at or after his death, and that *at most* only that proportion of the trust property a life estate in which at the time of the execution of the deed, for a woman of Mrs. May's age, would have been equal in value to a contingent life estate in the whole to a person of her age, expectant upon the determination of a preceding life estate to a person of the age of her husband.

The decision of the Circuit Court of Appeals in the present case was rendered on January 9, 1929. The brief *per curiam* opinion states merely "this case is distinguishable from *Nichols v. Coolidge,* 274 U. S. 531, on the facts" (R. 41), but makes no mention of *Reinecke v. Northern Trust Co.,* which had been decided in the Circuit Court of

Appeals some months before, and must have been pending in this Court when the present case was argued below. In fact, *Reinecke v. Northern Trust Co.* was decided by this Court exactly one week before the Circuit Court of Appeals announced its decision in the present case, and on motion for a reargument, the decision of this Court in the Reinecke Case was strongly pressed on the Circuit Court of Appeals, but without avail. It is a matter of common knowledge, however, that on motion for a reargument a Court is apt to exercise the Christian virtue of perseverance, and it is therefore not incomprehensible that the Circuit Court of Appeals should adhere to a decision which seems to us to ignore a controlling decision of this Court.

It is not surprising, therefore, that Judge Dickinson, in the District Court for the Eastern District of Pennsylvania, has refused to follow the decision of his own Circuit Court of Appeals in the case at bar, on the ground that it is inconsistent with the decisions of this Court in *Nichols v. Coolidge*, 274 U. S. 531, and *Reinecke v. Northern Trust Co.*, 278 U. S. 339.

Carnill v. McCaughn, 30 Fed. (2d), 696, 699.

We are confirmed in the belief that the decision of the Court below is inconsistent with the decision of this Court in *Reinecke v. Northern Trust Co.*, 278 U. S. 339, by the fact that the learned counsel for the Government in their brief in the Circuit Court of Appeals, filed before the decision of this Court in *Reinecke v. Northern Trust Co.*, conceded that the decision of that case would in all probability control this case. The brief stated:

> "The attention of the Court is called to the fact that the issue presented by the present case will probably be settled by the decision of the Supreme Court in *Reinecke, Collector, v. The Northern Trust Co.*, * * *. It seems likely the decision of the Supreme Court in this case will largely if not entirely settle the contention now existing between taxpayers and the Government relative to transfers of the character under discussion in the case at bar." (Brief for Appellee below, pp. 24-5.)

CONCLUSION.

Upon the whole, therefore, we respectfully submit that on each and all of the three grounds above set forth, the judgment for the defendant should be reversed, and the cause remanded for further proceedings.

ARTHUR W. MACHEN, JR.,

Attorney for Safe Deposit and Trust Company of Baltimore, Amicus Curiae.

FILE COPY

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IN THE

Supreme Court of the United States

October Term, 1929.

No. 311.

WALTER A. MAY, HERBERT L. MAY, EDWIN C. MAY, ET AL., EXECUTORS OF THE LAST WILL AND TESTAMENT OF PAULINE MAY, DECEASED, PETITIONERS,

vs.

D. B. HEINER, COLLECTOR OF INTERNAL REVENUE FOR 23RD DISTRICT OF PENNSYLVANIA.

MOTION FOR LEAVE TO FILE BRIEF AS AMICUS CURIÆ AND BRIEF.

WARD LOVELESS,
Amicus Curiae.

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D. B. HEINER, COLLECTOR OF INTERNAL REVENUE FOR 23RD DISTRICT OF PENNSYLVANIA.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT.

MOTION FOR LEAVE TO FILE BRIEF AS AMICUS CURIÆ.

MAY IT PLEASE THE COURT:

The undersigned respectfully moves this Honorable Court for leave to file the accompanying brief in this case as amicus curiae.

WARD LOVELESS,
Amicus Curiae.

IN THE

Supreme Court of the United States

October Term, 1929.

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vs.

D. B. HEINER, COLLECTOR OF INTERNAL REVENUE.

BRIEF OF WARD LOVELESS, AMICUS CURIÆ.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT

Statement.

The petitioners filed a statement of claim, followed by an amended statement of claim, in the District Court below, for the recovery of Federal estate taxes. The respondent filed a motion to strike—the equiva-

lent of a demurrer—which the District Court below granted (25 Fed. (2d) 1004). On appeal to the Circuit Court of Appeals below, the District Court was affirmed (R. 41-42) and the propriety of such affirmance is now in question in this court.

The facts are sufficiently stated in the briefs of the parties.

Argument.

I

The Court below did not, and the Circuit Court of Appeals in Nichols v. Bradley, 27 Fed. (2d) 47, did, observe the essential distinction between inheritance taxes and the Federal estate tax.

The decision in this case in the court below is clearly based upon the construction by State courts of the phrase "to take effect in possession and enjoyment at or after death" as it appears in the State inheritance tax laws. It seems clear also that if the court had kept in mind the distinction between the Federal estate tax law and the inheritance tax laws of our several states, a different decision must have been arrived at.

The State inheritance tax laws are based upon the right of the beneficiary to take under the State laws governing the devolution of property at death. It is a tax on the right to receive and the amount of the tax depends upon the size of the bequest or devise, the exemption allowed, the relationship of the beneficiary to the decedent, etc.

The Federal estate tax on the contrary is not a tax upon the right to receive but it is an excise or death

duty imposed upon the passing of the property from the decedent at death.

The Government collects this duty out of the net assets of the estate before they are distributed and it then has no further interest in their distribution. When, how, to whom, or upon what conditions they are distributed is of no concern to it.

The question to be determined, therefore, in every case under the Federal estate tax law is: Does property pass from the decedent at, and by reason of, his death? This view of the law is now clearly supported by a number of familiar decisions. Mr. Justice Holmes said in *Ithaca Trust Company vs. U. S.*, 279 U. S. 151, 155: "The tax is on the act of the testator, not on the receipt of property by the legatees." Citing *Y. M. C. A. vs. Davis*, 264 U. S. 47, 50; *Knowlton vs. Moore*, 178 U. S. 41, 49; *New York Trust Company vs. Eisner*, 256 U. S. 345, 348, 349; *Edwards vs. Slocum*, 264 U. S. 61. The same view is expressed in *Reinecke vs. Northern Trust Company*, 278 U. S. 339, 348.

It is quite evident from the repeated references of the court below to the rights of the donees and the citation only of State authorities that the court was looking at the subject from the standpoint of the beneficiaries and not from the standpoint of the testator. The court says: "In order to escape the statute the donee must be in actual possession and enjoyment of the property before death." Thus the time when the donee takes is made the determining factor on whether a tax should be assessed. This is, of course, directly opposed to the view expressed by this court in the above cases.

Mrs. May parted with the title, possession, and enjoyment of the property three years before she died, retaining only a reversionary right to the income in the event that she survived her husband. Assuming that she died first, this reversionary right never ripened into possession or enjoyment; therefore, no property right and no possession or enjoyment of the property passed from her on her death. She was then in the same position as to this property as she would have been in if she had never owned it. How then can a tax be assessed upon it?

The Government is forced to take the position that, although Mrs. May had parted with the title, the possession and enjoyment, and all control over the property, and although nothing remained for her to do to complete the transfer, and although no property right or interest passed out of her at her death, nevertheless the transfer was incomplete either because the beneficiaries did not come into complete enjoyment until after her death or because the failure of the contingency to occur is in some way analogous to the termination of control held under a power of revocation, or the power to change the beneficiaries of an insurance policy such as in the *Chase National Bank* case, 278 U. S. 327.

But the complete reservation of the control of the property by the donor for his own benefit should not be confused with a mere contingent right over which the donor had no control whatsoever.

The question involved in this case is practically the same as that in *Nichols vs. Bradley*, 27 Federal (2d) 47. In that case as in *May vs. Heiner* the donor cre-

ated a trust upon such terms that she never again had any possession or enjoyment of the donated property and she retained no vested legal interest in it. In each case the terms of the trust were such that upon the happening of a certain contingency, an interest might revest in the donor. In each case, too, the contingency never happened so that, actually, neither title, possession nor enjoyment ever revested.

The revesting in the May case would have occurred if the donor had survived her husband; it would have occurred in the Nichols case if the donor had survived her daughters. Except for the fact that the May contingency was somewhat more likely to happen than the other because of the relative ages, the cases are the same. The holding of the Circuit Court of Appeals of the First Circuit in the *Nichols vs. Bradley* case is squarely opposed to the holding below in *May vs. Heiner*. The ground of the decision appears in the following paragraph from the opinion, page 48:

> "But we think that, upon making the trust deed, Mrs. Bradley parted with the possession and enjoyment of this half of the property contributed by her to the trust, and that she was to have no reversionary interest in this half unless the daughters and their issue failed to survive her, or (what is the same thing) unless she survived the daughters and their issue, which she did not do. Having died first, no reversionary interest ever arose in her favor. Her death did not pass the right to the possession and enjoyment of the half of the property and income here in question from her to the daughters and their issue. That right passed to them at once by the

declaration of trust, subject to defeasance in case they failed to survive Mrs. Bradley. Her death, however, before that of her daughters, foreclosed the possibility of a reversionary interest arising in her favor. In other words, her death did not effect the transfer of the possession and enjoyment of the property and income to the daughters from and after that time, but, having occurred during the lifetime of the daughters, it foreclosed the possibility of her acquiring a reversionary interest in this half of the property."

It is difficult to find a flaw in this clear reasoning and, of course, it is directly opposed to the reasoning in *May vs. Heiner*. It is significant that although the Government lost the *Nichols vs. Bradley* case, it did not ask this court to review it. In the *Nichols vs. Bradley* case, too, the court clearly indicates that it considers that the value of a reversionary interest is measured by the actual facts rather than by complicated mathematical computations based upon actuary's figures and the court holds that when Mrs. Bradley died such reversionary interest had no value and it then appeared as a matter of fact that it never did have any value. The same reasoning, of course, applies to the reversionary right of Mrs. May to the income in the event that she survived her husband.

See also Article 11, Regulations 70, *Kahn vs. Bowers*, U. S. Dist. Ct., Southern Dist., N. Y.; affirmed Circ. Ct. of Appeals, 2nd Circ., December 16, 1925, published by authority of Treasury Department as T. D. 3821, V-1 Cumulative Bulletin, page 409; not in Federal Reporter. *Curley vs. Tait*, 276 Fed. 840. *Humes vs. U. S.*, 276 U. S. 487.

II.

The inter vivos transfer of a remainder interest is not a transfer intended to take effect in possession or enjoyment at or after death within the meaning of the Revenue Act of 1918.

It is our contention under Section III, infra, that if Sec. 402 (c) of the Revenue Act of 1918 is construed to include in the gross estate of Mrs. May, the decedent, the property transferred by her on May 15, 1917, and October 1, 1917, it is unconstitutional.

To avoid this result, this section of the statute must, if possible, be so construed as not to include these transfers.

But irrespective of the question of unconstitutionality, we contend that, viewed in the light of the purpose sought to be accomplished by Sec. 401 (c), that section must be construed as not including these transfers.

Sec. 402 (c) includes two kinds of transfers, those in contemplation of death, and those intended to take effect in possession or enjoyment at or after death.

It is not contended by the Government that the present transfers were in contemplation of death. Therefore, if included at all, it must be as transfers intended to take effect in possession or enjoyment at or after death.

Sec. 402 of the statute defines the interests included in the gross estate, but imposes no tax.

The tax is imposed by Sec. 401 (*Reinecke vs. The Northern Trust Co.*, 278 U. S. 339, 348, *supra*).

By the express language of Sec. 401 the tax is limited to transfers of the estates of decedents, that is, property passing from decedents upon death.

Therefore the definitions of the gross estate contained in Sec. 402 are restricted by Sec. 401 to interests passing upon death.

In recognition of this, *Reinecke vs. The Northern Trust Company*, 278 U. S. 339, *supra*, holds that no trusts or interests are included within the scope of Sec. 402 (c) other than those passing from the possession, enjoyment or control of the donor at his death, and so taxable as transfers at death under Sec. 401 (p. 348).

The particular transfers there held taxable were those where the grantor retained the power of revocation, terminable at his death. For this reason the property remained his in effect until he died, for he could retake it under his power at any time, and the disposition was testamentary in character.

A conveyance *inter vivos*, without power of revocation, passes the grantor's interest out of his possession, enjoyment and control, whether that interest be a fee, a life estate or a remainder, nor is such passing affected by the circumstance that the grantor may retain some other and different interest in the same property, as where he retains a life estate and conveys away the remainder.

Such a remainder interest is a present vested interest, susceptible of separate control, possession and enjoyment, which may be sold, mortgaged or other-

wise dealt with, and may be appraised by deducting from the value of the property itself the value of the life-estate computed according to mortality tables.

It is significant that Sec. 402 (c), in defining the content of the gross estate, refrains from including transfers of the *property* itself, which might perhaps import the right to manual possession, but in express terms confines its scope to "any interest therein", thus explicitly recognizing that a partial interest in property may pass without a transfer of the property itself.

It must be presumed that Congress used this word "interest" advisedly, and since it is not restricted to any particular kind of interest, it must of necessity include remainder interests, or any other part less than the whole, just as it may include fractional interests.

A remainder interest, just as any other interest, may be transferred outright by conveyance *inter vivos*, or it may be transferred in contemplation of death, or by an instrument whereby the grantor retains the right of revocation, in which last mentioned case it would class as a transfer intended to take effect in possession or enjoyment at or after death.

Therefore it is to the nature of the conveyance rather than to the quantum or character of the interest conveyed that Sec. 402 (c) has reference.

It has been held in the following cases that a present *inter vivos* transfer of a remainder interest takes effect immediately in possession and enjoyment, not at or after death, for it classes as a *present* interest, in the language of the statute.

Frew vs. Bowers, 12 Fed. (2nd) 625 (C. C. A., 2nd Circ., June 1, 1926).

Miller vs. United States, 62 Ct. of Claims 404.

Arnold vs. United States, 62 Ct. of Claims 439.

McCaughn vs. Girard Trust Company, 3 Fed. (2nd) 618, reversed in 11 Fed. (2nd) 520.

In commenting on the decision of the Circuit Court of Appeals in the Girard case (last above cited), the court in *Carnill vs. McCaughn*, 30 Fed. (2nd) 696 (Dist. Ct., E. D. Penna., Feb. 13, 1929) said (p. 699):

> "The real question is whether there has not been, since the Girard Case, a modification of the doctrine there (and in many other cases) laid down, particularly since the rulings in the Coolidge Case, supra, and in Reinecke v. Northern Trust Co., 49 S. Ct. 123, 73 L. Ed.———, and Chase v. United States, 49 S. Ct. 126, 73 L. Ed.———, opinions which have just been handed down. We think there has been this modification.
>
> "Without prolonging the discussion, the doctrine now is that a given property may be included for tax purposes, to base the tax imposed (1) if the property forms part of the decedent's estate; (2) if it has been transferred in 'contemplation of death' in attempted evasion of the tax; (3) if the death of the decedent renders the transfer of the property complete and absolute, which before that was not complete as, for illustration, when a trust is created subject to a power of revocation or the like in the decedent, and (4) which is really included in the second, if such power of revocation be released in contemplation of death. This excludes as a basis for the tax (1) transfers made for a consideration; (2) transfers made by way of an

out and out gift not in contemplation of death; (3) *transfers by way of a gift of the remainder after a life estate reserved, when the gift is not in contemplation of death, is absolute, and the decedent up to the time of his death had no power of control over or to direct the course of distribution of the property by his action or non-action.* (Italics ours.)

"The property here in question is of the third above class, and the tax payment was in consequence unlawfully exacted. These later cases are in no sense in conflict with the Coolidge Case."

After the transfer, this remainder is no longer an asset of the grantor. Before he transferred it he had dominion over the property itself, which he could at will convert into cash, to be expended, used or given away as he pleased. This ownership and control passed out of him upon the transfer, leaving merely his interest in the income, terminable upon his death. He has lost the *jus disponendi* as well as the right to enjoy the fee.

Viewed in its legal aspects, he has no more interest in the property than if he had been given his life estate by some third party, with remainder to another. In neither case has he anything to transmit upon his death.

Similarly, if such third party had given to someone other than the decedent an estate for the life of the decedent, and the remainder to the decedent and his heirs, a deed executed by the latter of that remainder interest would pass from him all that he had, leaving nothing to be transferred at his death. In such

case, the nature of the remainder interest so transferred by the decedent in his lifetime would be precisely the same as the remainder transferred by him where he himself retains his life interest. In each case it is a present transfer of a definite interest.

This construction of Section 402 (c) of the statute leaves a definite meaning and purpose to the expression "intended to take effect in possession or enjoyment at or after his death." It is significant that this language makes the *intention* as to finality the criterion of taxability, rather than the nature of the interests created or conveyed by the instrument of transfer.

For example, the grantor may deliver an absolute present conveyance, but upon a collateral agreement that he shall be permitted to retain the possession and use of the property itself until his death, so that the deed, while apparently absolute on its face, does nevertheless not in fact take effect in possession and enjoyment until the grantor's death, that is, it is *intended* to take effect at the death.

Similarly, where the grantor retains the power of revocation, as in the Reinecke case, the transfer, though in terms taking effect at once as a transfer, is nevertheless not *intended* so to operate with finality, by reason of the collateral provision contained in the instrument which retains actual control in the grantor.

This distinction may be clarified by paraphrasing the language of the statute, so that, instead of reading, "intended to take effect in possession or enjoyment at or after death," it would be "intended not to take effect in possession or enjoyment upon delivery." This brings out the actual operation of this clause as

being a collateral limitation preventing the instrument from taking immediate effect in accordance with its terms, rather than a provision descriptive of the character of the interests created by the instrument.

Thus construed, the class of transfers included resemble more closely the other class with which they are here grouped, namely, transfers in contemplation of death, for both classes are apparently absolute conveyances, but in fact only become such upon death, and are therefore testamentary in character.

So the Reinecke case, enumerating the miscellaneous items of property included by Sec. 402 in the gross estate, points out that they are either property transferred in contemplation of death or property passing out of the control, possession or enjoyment of the decedent at his death, giving as examples property held by the decedent in joint tenancy or by the entirety, property of another subject to the decedent's power of appointment, and insurance policies effected by the decedent on his own life, payable to his estate or to others at his death (p. 348).

The category thus contemplated by the statute excludes present irrevocable *inter vivos* transfers of any presently existing estate or interest in the property, whether a remainder or other interest, and whether such remainder or other interest was created by virtue of limitations contained in the instrument of transfer or was previously existing.

Such transfer, when presently creating the interest transferred, and operating to transfer the same irrevocably *inter vivos,* is not a transfer *intended* to take effect in the future, but intended to take effect

upon delivery. It is not testamentary in character, and is not within the purview of the statute.

We submit that the history of death duty legislation elucidates the purpose of incorporating Sec. 401 (c) in the statute, showing its proper construction to be as we have indicated.

Originally the only transfers that were subjected to the tax were those by will and under the intestate laws. But it was found that testators avoided this tax by transfers in contemplation of death, or by transferring their property during their lifetime, while still reserving the control and disposition thereof by power of revocation and disposition. In order to prevent this, and to preserve to the Government the same revenue which it would derive if all this property had been held until death, the statute was amended to include a tax upon all such transfers, which were really testamentary in character. The transfers aimed at were those used as a substitute for a will.

It is therefore only when a transfer offers an inducement to a testator as an asylum of escape from the tax that it comes within the class made taxable. Measured by this test, a conveyance which passes from the grantor the entire interest in the property except the income for life, so that he no longer has the *jus disponendi*, or the right to the use and expenditure of the principal, deprives him of a valuable asset out of all proportion to the indirect benefit which he may receive through the avoidance of an estate tax on the property involved, for he himself never shares in that

benefit. It belongs entirely to those who take upon his death.

Therefore the making of such a transfer would not appeal to the normal individual as a desirable method of escaping the tax, for it would exact too great an economic penalty in other respects, in proportion to the object of tax avoidance.

Hence transfers of this type do not tend to produce the consequences which Congress sought to avoid by including Sec. 402 (c) in the Act, and are not within the purview of the act.

III.

If section 402 (c) of the Revenue Act of 1918 is construed to include in the gross estate of the decedent the property transferred by her on May 15, 1917, and October 1, 1917, it is unconstitutional as so retroactively applied.

The Revenue Act of 1916, as amended, was in force when the transfers here in question were made.

The Revenue Act of 1918 was passed after the making of these transfers, but before the death of the decedent, and was in effect at her death. By this Act, the Act of 1916, as amended, was repealed.

It is contended by the Government that the 1918 Act is a reenactment of the prior Act, which therefore operates without interruption.

Reference to the actual language of the 1918 Act, however, refutes this argument, for it is expressly provided to be *instead* of the prior statute, as follows:

> "Sec. 401. That (*in lieu of* the tax imposed by Title II of the Revenue Act of 1916, as amended, and *in lieu of* the tax imposed by Title IX of the Revenue Act of 1917) a tax equal to the sum of the following percentages of the value of the net estate (determined as provided in Section 403) *is hereby imposed* upon the transfer of the net estate of every decedent dying after the passage of this Act, whether a resident or a non resident of the United States:"

This is, by express provision, the enactment of a new law, to supersede the old. No other interpretation will fit the words, "*in lieu of the tax imposed by Title II of the Revenue Act of 1916,*" etc. The old tax is *replaced* by the new tax "hereby imposed," which affects only those "dying after the passage of this Act."

Later follows the express repeal of the prior law, without saving clause except as to taxes accrued (Section 1400). Such accrual could only take place upon death.

In the language of the Board of Tax Appeals in *Harris vs. Commissioner of Internal Revenue,* 5 B. T. A. 41, 44:

> "The effect of the repeal of Title IV of the Revenue Act of 1918 was to obliterate the repealed statute just as completely as if it had never been enacted into law, and it must be considered as a statute that never existed, except for the purpose set forth in Section 1400 (b) of the Revenue Act of 1921."

This new tax, as applied to Mrs. May's transfers, is retroactive.

We submit that Congress, which is without power, under *Nichols vs. Coolidge*, 274 U. S. 531, to impose a retroactive tax on past transfers, cannot derive such power from the fact that it had previously imposed a prospective tax upon the same transfers, but which had been removed.

The power so to tax subsists so long only as it is prospective. The non-exercise of the power, or its exercise followed by repeal, leaves the transfers tax-free, and Congress' lack of power to reach back and impose a new tax is a matter of substance.

When a past transfer has once been freed of the burden of a pre-existing tax, its status, as a matter of actual fact, is the same as that of any transfer which was not originally subject to tax. The tax is gone, and actualities cannot be ignored. So far as the future is concerned, both are equally entitled to protection from retrospective burdens.

The new enactment must be tested by the principles applicable to all statutes, must stand or fall according to its own content, and cannot draw for validity on pre-existing legislation.

IV.

If Section 402 (c) of the Revenue Act of 1918 is construed to include in the gross estate of the decedent the property transferred by her on May 15, 1917, and October 1, 1917, it is unconstitutional because such transfers by the decedent bear no reasonable relation to the purposes sought to be accomplished by the taxing Act.

The purpose of the Act was to tax transfers which are testamentary in character.

In *Nichols vs. Coolidge,* 274 U. S. 531, this Court said (p. 540):

> "But the conveyance by Mrs. Coolidge to trustees was in no proper sense testamentary, and it bears no substantial relationship to the transfer by death."

A present transfer of a remainder *inter vivos* is not testamentary in character, and is not within the legitimate scope of Sec. 402 (c), for the reasons pointed out under Section II above.

Congress, in classifying transfers for the purpose of imposing an estate tax, or death duty, is without power to declare transfers to be testamentary in character which in fact are not such, and a statute which attempts to do so is arbitrary and unconstitutional.

It was definitely held in *Schlesinger vs. Wisconsin,* 270 U. S. 230, that it is the actual fact which governs, and that an instrument cannot be made testamentary in character by an attempt to classify it as such. In that case the Wisconsin statute was held invalid which provided that all material gifts made within six years of death should be conclusively presumed to have been made in contemplation of death. The court said that there was no adequate basis for the distinction made by the statute between gifts made within the six years and gifts at other times.

In *Black vs. State,* 113 Wis. 205, 89 N. W. 522, the court had the following to say concerning the requirements of legal and constitutional classification (p. 528):

> "* * * It is a trite expression that classification, in order to be legal, must be rational; it must be founded upon real differences of situation or conditions, which bear a just and proper relation to the attempted classification, and reasonably justify a difference of rule."

In *Nichols vs. Coolidge*, the Court further says (p. 542):

> "Undoubtedly, Congress may require that property subsequently transferred in *contemplation of death* be treated as part of the estate for purposes of taxation. This is necessary to prevent evasion and give practical effect to the exercise of admitted power, but the right is limited by the necessity." (Italics ours.)

The right is thus confined to the inclusion of such transfers as may be classed with those in contemplation of death as being testamentary in character. We submit, as above stated, that the transfers now before the Court do not come within this category.

Respectfully submitted,

WARD LOVELESS,
Amicus Curiæ.

CORRECTED COPY

SUPREME COURT OF THE UNITED STATES.

No. 311.—October Term, 1929.

Walter A. May, et al., Executors, etc., Petitioners, *vs.* D. B. Heiner, Collector of Internal Revenue for the 23rd District of Pennsylvania.	On Writ of Certiorari to the United States Circuit Court of Appeals for the Third Circuit.

[April 14, 1930.]

Mr. Justice McReynolds delivered the opinion of the Court.

By a written instrument dated October 1st, 1917, Pauline May, wife of Barney May, "transferred, set over and assigned" to him and others, as trustees, (with power to change the investments) certain described securities—bonds, notes, corporate stocks, and money—in trust, to collect the income therefrom and after discharging taxes, expenses, etc., to pay the balance "to Barney May during his lifetime, and after his decease, to Pauline May during her lifetime, and after her decease, all the property in said Trust, in whatever form or shape it may be, shall, after the expenses of the Trust have been deducted or paid, be distributed equally among" her four children, their distributees, or appointees.

Mrs. May died March 25, 1920. Thereafter the Commissioner of Internal Revenue, purporting to proceed under authority of the Revenue Act of 1918, Title IV, 40 Stat. 1057, 1096, 1097, demanded that her executors pay additional taxes reckoned upon the value of the property held under the above-described trust instrument. Having paid the required sum, the executors—petitioners here—asked that it be refunded. By order of February 20, 1924, the Commissioner denied their request. In support of this action he said—

> "This trust was included in decedent's gross estate on final audit and review on the ground that it was intended to take effect in possession or enjoyment at or after death. In this

case the principal of the trust fund could not take effect in possession until the death of the decedent. According to the provisions of the trust agreement, if the decedent's husband died before her, the income was to be paid to her until her death. The gift of the principal, therefore, could not take effect during the decedent's lifetime. This case comes literally within the terms of the statute, and it has been held by a number of courts in different States that such a transfer as this is taxable, these cases being decided under statutes using the same language as is contained in the Federal Estate Tax Law."

Seeking to enforce their claim the executors sued the Collector in the District Court, Western District of Pennsylvania; judgment in his favor was affirmed by the Circuit Court of Appeals. The matter is here upon certiorari.

The record fails clearly to disclose whether or no Mrs. May survived her husband. Apparently she did not. But this is not of special importance since the refund should have been allowed in either event.

The transfer of October 1st, 1917, was not made in contemplation of death within the legal significance of those words. It was not testamentary in character and was beyond recall by the decedent. At the death of Mrs. May no interest in the property held under the trust deed passed from her to the living; title thereto had been definitely fixed by the trust deed. The interest therein which she possessed immediately prior to her death was obliterated by that event.

Section 401, Revenue Act of 1918, lays a charge "upon the transfer of the net estate of every decedent dying after the passage of this Act," and Section 402 directs that "the value of the gross estate of the decedent shall be determined by including the value at the time of his death of all property, real or personal, tangible or intangible, wherever situated . . . (c) to the extent of any interest therein of which the decedent has at any time made a transfer, or with respect to which he has at any time created a trust, in contemplation of or intended to take effect in possession or enjoyment at or after his death . . ."

The statute imposes "an excise upon the transfer of an estate upon death of the owner". *Y. M. C. A.* v. *Davis,* 264 U. S. 47, 50; *Nichols* v. *Coolidge,* 274 U. S. 531, 537.

Act of 1921, 42 Stat. 278, as see 402 (c) thereof,

In *Reinecke* v. *Northern Trust Co.*, 278 U. S. 339, 347, 348, the estate tax prescribed by the Revenue Act of 1918 was under consideration. This Court said—

> "In its plan and scope the tax is one imposed on transfers at death or made in contemplation of death and is measured by the value at death of the interest which is transferred. . . . One may freely give his property to another by absolute gift without subjecting himself or his estate to a tax, but we are asked to say that this statute means that he may not make a gift *inter vivos*, equally absolute and complete, without subjecting it to a tax if the gift takes the form of a life estate in one with remainder over to another at or after the donor's death. It would require plain and compelling language to justify so incongruous a result and we think it is wanting in the present statute. . . .
>
> "In the light of the general purpose of the statute and the language of Sec. 401 explicitly imposing the tax on net estates of decedents, we think it at least doubtful whether the trusts or interests in a trust intended to be reached by the phrase in Sec. 402 (c) 'to take effect in possession or enjoyment at or after his death,' include any others than those passing from the possession, enjoyment or control of the donor at his death and so taxable as transfers at death under Sec. 401. That doubt must be resolved in favor of the taxpayer. . . ."

The judgment of the Circuit Court of Appeals is erroneous and must be reversed. The cause will be remanded to the District Court for further proceedings in conformity with this opinion.

Reversed.

A true copy.

Test:

Clerk, Supreme Court, U. S.